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Supreme Court of the United States

OCTOBER TERM, 1965.

No. _____ Original.

STATE OF OHIO,

Plaintiff,

vs.

STATE OF KENTUCKY,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Ohio by its Attorney General, asks leave of the Court to file its complaint against the State of Kentucky submitted herewith.

WILLIAM B. SAXBE,
Attorney General of Ohio.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. _____, Original.

STATE OF OHIO,

Plaintiff,

vs.

STATE OF KENTUCKY,

Defendant.

COMPLAINT

COMES NOW, the State of Ohio by and through its Governor and Attorney General and brings this action against the State of Kentucky and for its cause of action states:

1. The jurisdiction of this Court is invoked under Clause 2, Section 2, Article III of the Constitution of the United States and under Section 1251 (a) (1), Title 28, United States Code.

2. The plaintiff since the 1st day of March, 1803, to the present has been a State of the United States.

3. The defendant since the 1st day of June, 1792, to present has been a State of the United States.

4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.

5. The State of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that certain act of the Virginia Legislature entitled "An Act concerning the erection of the district of Kentucky into an independant state", passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.

6. The northern boundary line of the State of Kentucky was established from the Cession of Virginia and the Virginia-Kentucky Compact as the low water mark on the northerly side of the Ohio River as it existed in the year 1792.

7. Pursuant to the terms of the Virginia-Kentucky Compact, jurisdiction over the Ohio River was established as being concurrent between the states possessing the opposite shores of the river.

8. In the years of 1836 to 1906 the United States Government, acting through the Corps of Engineers of the Army, made a comprehensive, reliable, and monumented survey of the Ohio River, establishing the low water marks of the river. Later, the United States Government again acting through the Corps of Engineers of the Army, erected dams in the Ohio River for navigational purposes, during the period of 1910 to 1929. From 1955 to the present the United States Government using the Corps of Engineers of the Army, has been replacing the earlier dams with new dams which are higher and achieve better navigational conditions.

9. The original dams caused the waters of the Ohio River to rise and permanently inundate various areas of both states. The new dams are causing much greater areas of both states to be permanently inundated by the Ohio River. As a result, the shores or banks of the Ohio River

charts numbered 13 through 136 based on the surveys made in 1896 to 1906.

3. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto.

That further, the State of Kentucky be permanently enjoined and restrained from disturbing the State of Ohio and its citizens in the peaceful enjoyment and use of said land, water, and jurisdiction inconsistent with the Court's decision.

Any further relief as may be granted by this Court.

The State of Ohio
by
JAMES A. RHODES,
Governor

WILLIAM B. SAXBE,
Attorney General of Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. _____, Original.

STATE OF OHIO,

Plaintiff,

vs.

STATE OF KENTUCKY,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and under Title 28, United States Code, Section 1251 (a) (1).

QUESTIONS PRESENTED

1. What is the boundary line between the State of Ohio and the State of Kentucky?
2. What is the jurisdiction of the State of Ohio and the State of Kentucky over the Ohio River?

STATEMENT

At the time of the Revolutionary War the Commonwealth of Virginia owned or claimed all of the land which now comprises the states of Ohio and Kentucky, among others. Heeding the request of Congress, the Commonwealth of Virginia ceded to the United States in the year 1784 the following described land:

"... by these presents, convey, transfer, assign, and make over, unto the United States, in congress assembled, for the benefit of the said States, Virginia inclusive, all right, title and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, *situate, lying, and being, to the northwest of the river Ohio*, . . ." 1 Laws of the United States 472, 474 (1784). (Emphasis added)

This grant by Virginia is known as the "Cession of Virginia." On April 30, 1802, Congress carved out of the above described land the State of Ohio. The southern boundary of this state was described by Congress as: ". . . bounded on the east by the Pennsylvania line, on the south by the Ohio river, to the mouth of the Great Miami river . . ." 2 Stat. 173 (1802).

The State of Kentucky was not embraced in the land ceded by Virginia, but rather was formed from land retained by Virginia. On December 18, 1789, the legislature of Virginia passed an act enabling the then "district of Kentucky" to be formed into an independent state. See 1 Laws of the United States 673 (1789). This act, which is commonly referred to as the "Virginia-Kentucky Compact", defined the boundaries of the state to be formed as being the same as those of the district of Kentucky. 1 Laws of the United States 673, 674 (1789). In admitting Kentucky to statehood, Congress adopted as the new state's boundaries those of the district of Kentucky as they existed on December 18, 1789. See 1 Stat. 189 (1791). Consequently,

the State of Kentucky has for its northern boundary the Ohio River, for this was the northern boundary of the land retained by Virginia after its cession in 1784, and was the northern boundary of the area which Kentucky as it existed on December 18, 1790. Kentucky officially became a state on June 1, 1792. 1 Stat. 189 (1792).

The State of Ohio does now, and has always claimed and maintained that the boundary between it and the State of Kentucky is the northerly low water mark of the Ohio River, as that mark existed in the year 1792 when Kentucky became a state and that it has equal and concurrent jurisdiction with the State of Kentucky on and over the entire Ohio River. However, the State of Kentucky claims that the boundary between it and the State of Ohio is the present northern shore of the Ohio River and that it has exclusive jurisdiction on and over the entire Ohio River. The dispute between Ohio and Kentucky as to the location of the boundary is compounded by the increased elevation of the river due to the erection of dams, which have caused the river to permanently increase in breadth.

Kentucky's claim of ownership to the northern shore is evidenced by its boundary statute which reads in pertinent part:

"The boundary with Ohio, Indiana and Illinois begins at a point where a line running through the center of the Big Sandy River intersects the low water mark on the northern shore of the Ohio River; thence it runs in a westerly direction along the northern or northwestern shore of the Ohio, to a stake on the bank of the Ohio River . . ." Notes and Annotations to the Kentucky Revised Statutes (1942), Title I, Chapter 1, p. 2.

(Emphasis added)

Kentucky, by the aforesaid statute and acting through its officials and employees, has acted both to assert that the boundary between Ohio and Kentucky is the present north shore of the Ohio River and furthermore, has denied the

doctrine of concurrent jurisdiction. Kentucky attempts to require all Ohio residents who own boats docked in the Ohio River to have Kentucky boating licenses; therefore, Kentucky in effect denies both the legal ownership of the State of Ohio to the portion of the Ohio River north of the low water mark as it existed in 1792, and the doctrine of concurrent jurisdiction as pronounced in the case of *Wedding v. Meyler*, 192 U.S. 573 (1904).

Similar incidences of Kentucky's exclusive claim of ownership of all of the river and claim of exclusive jurisdiction over the river are evidenced by Kentucky's attempt to require all Ohio residents fishing in any part of the river to have a Kentucky fishing license.

An analogous situation has arisen regarding the sale of liquor from wharfs, docks, boats, and marinas attached to or connected with the north shore of the river. Kentucky is insisting that her liquor licensing requirements be met by such establishments and that such business pay certain Kentucky taxes. In this instance it is clear that Kentucky does not recognize any rights of Ohio to ownership of the territory north of the low water mark as it existed in 1792, and further, denies the existence of any concurrent jurisdiction over the river.

ARGUMENT I

THE STATE OF OHIO MAINTAINS THAT IT OWNS THAT PART OF THE OHIO RIVER WHICH IS NORTH OF THE NORTHERN LOW WATER MARK AS THAT MARK EXISTED IN THE YEAR 1792.

The analysis set forth in the "Statement of Facts", *supra*, revealed that the Commonwealth of Virginia originally owned or claimed all of the land that comprises the states of Ohio and Kentucky. That pursuant to the Cession of Virginia, Virginia granted to the United States all of the land owned by it ". . . situate, lying and being, to the northwest of the river Ohio . . ." 1 Laws of the United

States 473, 474 (1784). Thereafter, the State of Ohio was created by Congress who described Ohio's southern boundary as follows: "... on the south by the Ohio River; ..." 2 Stat. 173 (1803). Thus, the land retained by Virginia after the cession was bounded on the north by the Ohio River, and hence the southern boundary of the district of Kentucky, to which the State of Kentucky succeeded, was the Ohio River.

Like Ohio, the State of Indiana was formed from the land ceded by Virginia; therefore, it has for its northern boundary the Ohio River. See 3 Stat. 382 (1816), and 3 Stat. 399 (1816). Thus, a determination of the boundary between the states of Indiana and Kentucky would control the determination of the boundary between the states of Ohio and Kentucky.

This Court has twice spoken on the boundary between the states of Indiana and Kentucky. The first of these pronouncements was the case of *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820), wherein the plaintiff claimed an island or peninsula in the Ohio River under a grant from the State of Kentucky and the defendant claimed said land under a grant from the United States as being part of Indiana. Thus, the question involved was whether the land was owned by the State of Kentucky or whether it was part of Indiana. In reaching this question the Court stated:

> "The question whether the lands in controversy lie within the State of Kentucky or of Indiana, depends chiefly on the land law of Virginia, and on the cession made by that State to the United States." 18 U.S. 374, 376.

In response to the question of whether Indiana owns to the low water mark of the river or whether Indiana's ownership stopped at a line reached by the river when at its medium height, the Court answered:

> "In pursuing this inquiry, we must recollect that it

is *not the bank of the river, but the river itself*, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying, and being, to the northwest of the river Ohio.'" *Handly's Lessee, supra*, at 379. (Emphasis added)

Having determined that the river, not the bank, was the boundary the Court continues:

> "If it be true, that the river Ohio, not its ordinary bank, is the boundary of Indiana, the limits of that State can be determined only by the river itself. *The same tract of land cannot be sometimes in Kentucky, and sometimes in Indiana, according to the rise and fall of the river. It must be always in the one State, or the other.*" *Handly's Lessee, supra*, at 382.
>
> (Emphasis added)

Although the Court examined the evidence concerning the location of the 1792 low water mark and also whether that mark was north or south of the land in question, and found that the land in question was owned by Indiana because it was located north of the low water mark, it remained for *Indiana v. Kentucky*, 136 U.S. 479 (1890), to clearly set forth the boundary.

In *Indiana v. Kentucky*, the Court was confronted with a dispute as to ownership of an island which at the time of the suit was located on the north side of the Ohio River. In finding that at the time when Kentucky became a State (June 1, 1792) the low water mark of the river was north of the island in question and thus Kentucky owned the island, the Court determined that the boundary between the states of Indiana and Kentucky was the low water mark of the Ohio River as that mark existed in the year 1792, and in this regard stated:

> ". . . If, when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the

river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. . . . Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river." Indiana v. Kentucky, 136 U.S. 479, 508 (1890). (Emphasis added)

The determination of the boundary between Indiana and Kentucky at the northerly low water mark of the Ohio River as that mark existed in 1792, should control in this dispute between Ohio and Kentucky because of the identical title relationship of the parties herein. The best available indication of this 1792 north low water mark is the detailed and monumented survey made by the Corps of Engineers U. S. Army, in the years 1896 to 1906 entitled "Ohio River Pittsburgh, Pa. to Mouth. In 260 Charts and Index Sheets, made under supervision of the Ohio River Board of Engineers on Locks and Dams by the District Engineer Office, Louisville, Ky., 1911-14, Revised 1929".

ARGUMENT II

THE STATE OF OHIO HAS EQUAL AND CONCURRENT JURISDICTION WITH THE STATE OF KENTUCKY OVER ALL OF THE OHIO RIVER, EXCEPT JURISDICTION INCIDENTAL TO THE SOVEREIGNTY OF THE SOIL UNDER THE RIVER AND STRUCTURES PERMANENTLY ATTACHED THERETO.

The State of Ohio has concurrent jurisdiction with the State of Kentucky over all of the Ohio River, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto.

This argument is founded on the explicit terms of the

Virginia-Kentucky Compact, which reads in pertinent part:

"III. *Seventh.* That the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and *the respective jurisdiction of this commonwealth, and of the proposed state, on the river aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.*" 1 Laws of the United States 673, 675 (1789). (Emphasis added)

The above-quoted language was interpreted by this Court in the case of *Wedding v. Meyler*, 192 U.S. 573 (1904). After first determining that this provision of the Virginia-Kentucky Compact was the law of the United States, the Court went on to say:

"... What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low-water mark on the river, and as part of that right, the right to serve process there with effect. *State v. Mullen*, 35 Iowa, 199, 205, 206. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effects of acts done upon the river, we have no occasion to decide in this case. But so far as applicable we adopt the statement of Chief Justice Robertson in *Arnold v. Shields*, 5 Dana, 18, 22, 30 Am. Dec. 669, 673: 'Jurisdiction, unqualified, being, as it is, the sovereign authority to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judicial, and executive—as that possessed by Kentucky over so much of the Ohio river as flows between them'.

"The conveniences and inconveniences of concurrent jurisdiction both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state. ..."

Wedding v. Meyler, *supra*, at 584-585.

From the foregoing it is amply clear that the State of Ohio has equal and concurrent jurisdiction with the State of Kentucky over all of the Ohio River, except jurisdiction incidental to the sovereignty of the soil under the river and structures permanently attached thereto.

CONCLUSION

By prior jurisprudential commitments, the Court has provided available guidelines for the determination of the boundary between the states of Ohio and Kentucky.

There is equally well established precedent furnished by decisions of this Court applicable to the controversy between Ohio and Kentucky concerning jurisdiction over the Ohio River.

In the first instance Ohio claims the boundary to be the north low water mark in the Ohio River, as that mark existed in the year 1792. Kentucky by statute and acts of its officials obviously does not consider this to be the law.

Through the acts of Kentucky officials and employees, Kentucky is attempting to deny the jurisdictional rights of Ohio on and over the Ohio River.

In view of these facts the Governor and Attorney General, on behalf of the State of Ohio, respectfully urge this honorable Court that the motion for leave to file the complaint submitted herewith be granted.

Respectfully submitted,

William B. Saxbe,
Attorney General of Ohio,
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Counsel for State of Ohio.

March 31, 1966.

FILED
MAY 26 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27, Original

STATE OF OHIO.....Plaintiff

VS.

STATE OF KENTUCKY.....Defendant

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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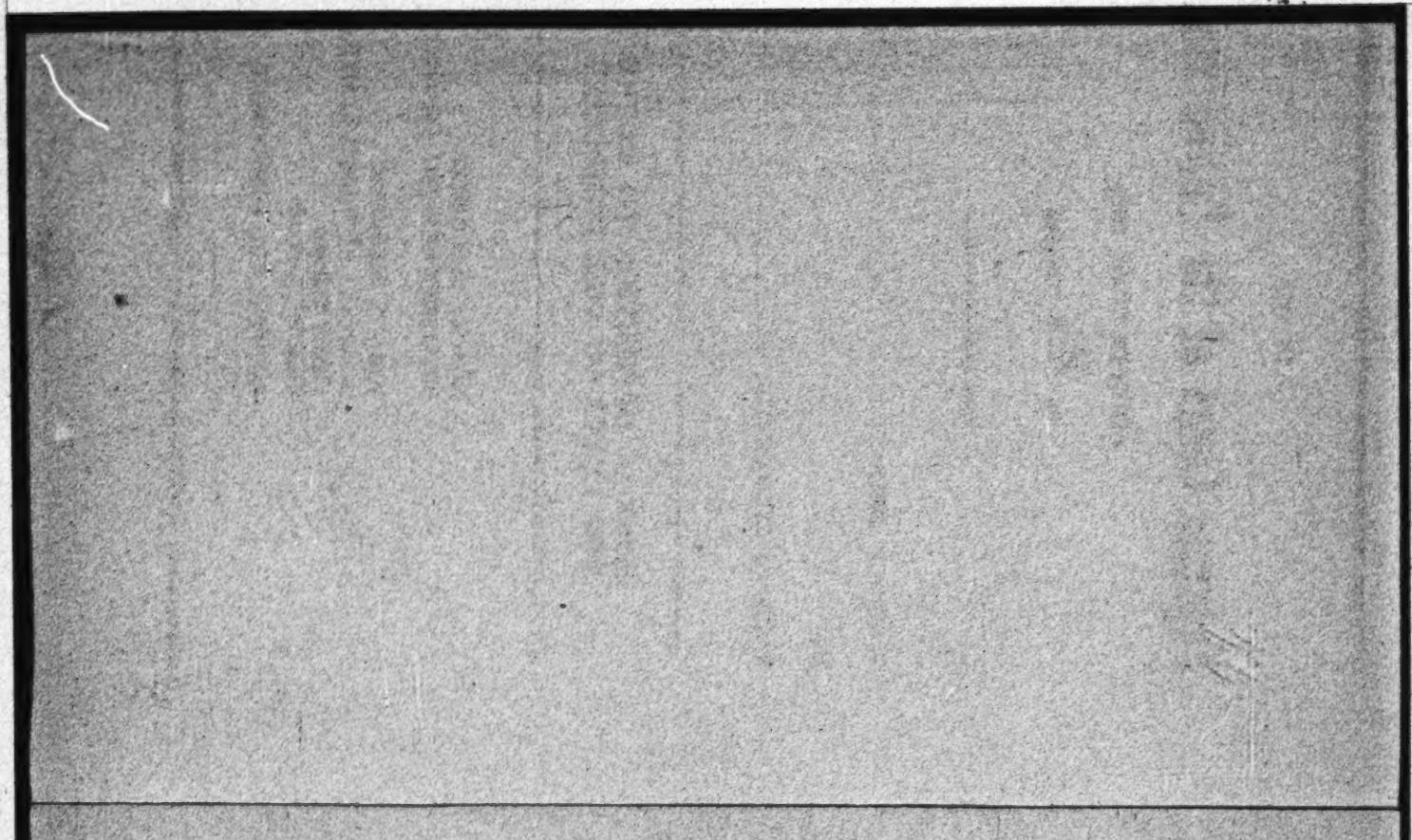

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1965

No. ———, Original

STATE OF OHIO ..... *Plaintiff.*

vs.

STATE OF KENTUCKY ..... *Defendant.*

STATEMENT

In the year 1784 the state of Virginia executed a deed of cession conveying to the Federal government all of its territory "situate, lying and being to the northwest of the River Ohio" upon the condition that it should be divided into three or more states to become part of the Federal union. The Ohio River was thus left in its original position as belonging to and owned by the state of Virginia. On December 18, 1789 the General Assembly of Virginia passed an act containing the terms and conditions upon which the district of Kentucky was erected into an independent state. The seventh clause of the compact between Virginia and Kentucky provided that the jurisdiction of Kentucky on the Ohio River "shall be concurrent only with the states which may possess the opposite shores of the said river." *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S.W. 724 (1916). In admitting Kentucky to state-

hood, Congress adopted as its boundaries those of the district of Kentucky as they existed on December 18, 1789. 1 Stat. 189 (1791).

Kentucky officially became a state on June 1, 1792. On April 30, 1802 Congress carved out of the land ceded by Virginia to the Federal government the State of Ohio, the southern boundary of which was described by Congress as the Ohio River. 2 Stat. 173 (1802).

The Commonwealth of Kentucky claims that the boundary between it and the state of Ohio is the low-water mark on the present northern shore of the Ohio River. Kentucky does not claim that it has exclusive jurisdiction upon and over the entire Ohio River, and it has not repudiated the doctrine of concurrent jurisdiction. It is not true, as stated by plaintiff, that Kentucky does not recognize any rights of Ohio to ownership of territory north of the low-water mark on the northwest shore.

Kentucky has not enacted a "boundary statute" as indicated by plaintiff in the quotation on page 8 of its brief taken from comments of the Reviser appearing in "Notes and Annotations to the Kentucky Revised Statutes." The Reviser noted on page 3 of that volume that the line running along the northern or northwestern shore is the *low-water mark* on such shore.

Kentucky is attempting to exercise its jurisdiction on the Ohio River with regard to enforcement of its statutes requiring licenses of boats, and has for some time been enforcing on the river with respect to Ohio residents as well as Kentuckians its laws relating to fishing licenses and intoxicating beverages.

ARGUMENT I

KENTUCKY HAS OWNERSHIP AND SOVEREIGNTY OVER THE OHIO RIVER SOUTH OF THE LOW-WATER MARK ON THE NORTHERN SHORE.

The opinion of this Court by Chief Justice Marshall in *Handly's Lessee v. Anthony*, 18 U.S. 374 (1820) established that the boundary between Kentucky and Indiana, and with the other states on the Ohio which were carved from the Northwest Territory ceded by Virginia, is the low-water mark on the northwest side of the river. In *Indiana v. Kentucky*, 136 U.S. 479 (1890) this Court held that the question of whether a certain tract of land should be considered a part of the state of Indiana or within Kentucky depended upon whether the land was separated from the mainland of Indiana by the waters of the Ohio River at the time that Kentucky became a state in 1792.

> "If when Kentucky became a State on the 1st of June, 1792, the water of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana."

The Kentucky Court of Appeals in *Perks v. McCracken*, 169 Ky. 590, 184 S.W. 891 (1916) applied the rule that the determination of whether a certain towhead or island sandbar in the Ohio River was located within the state of Illinois

or in Kentucky depended upon whether the island lay between the Kentucky shore and the low-water mark of the Ohio on its northwest side, as such mark existed when Kentucky became a state.

In *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 613 (1899) this Court stated:

> "It must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River."

Recent opinions of the Kentucky Court of Appeals have affirmed that the state boundary is the low-water mark on the northern shore. Thus in *Shannon v. Streckfus Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939), in holding that Kentucky could tax excursion steamers on the Ohio, it was said:

> "The sovereign power and jurisdiction of this Commonwealth extends to and over the waters of the Ohio river to the low water mark on the northern side, except so far as Kentucky may have ceded or surrendered jurisdiction to the United States for national purposes."

In *Louisville Sand & Gravel Co. v. Ralston*, Ky., 266 S.W.2d 119 (1954) the Court referred to "the low water mark on the northern shore, the adjudicated northern boundary of Kentucky." And in *Commonwealth v. Henderson County*, Ky., 371 S.W.2d 37 (1963) it was stated:

> "The ownership of the Commonwealth of Kentucky in its sovereign capacity extends to the low water mark on the northern or northwestern side of the river."

The Commonwealth of Kentucky agrees with the state of Ohio that Kentucky's boundary along the Ohio River extends only to the low-water mark on the northwest shore. The case of *Indiana v. Kentucky*, 136 U.S. 479 (1890) seems to stand for the proposition that a dispute regarding a par-

ticular tract of land which appears to be a part of the northwest bank of the Ohio River must be resolved by reference to the low-water mark of the river as it was on June 1, 1792 when Kentucky became a state, if it can be ascertained, in order to determine if the tract was an island on that date. In the present case Ohio does not set up a claim to any island or particular tract of land and there is actually no dispute over specific territory which this Court is asked to resolve. Ohio contends generally that the "best available indication" of the 1792 north low-water mark is the survey made by the U. S. Army Corps of Engineers in the years 1896 to 1906. Yet the proposed complaint does not describe any territory now regarded by Kentucky as being within its boundary to which title is claimed by Ohio under a different version of the location of the low-water mark.

Kentucky contends that the charts made by the Army Corps of Engineers based on the surveys of 1896 to 1906 certainly do not establish the low-water mark of the river as it was on June 1, 1792 and, having been made more than a century after that date, do not constitute substantial or probative evidence of the location of the original low-water mark line. The difficulty of even establishing that the Ohio flowed north of a certain tract of land when Kentucky became a state is manifested in the opinion of Mr. Justice Field in *Indiana v. Kentucky*, 136 U.S. 379 (1890) in which reference is made to the unsatisfactory nature of the evidence of former transactions, ancient witnesses and geological speculations, and in fact the Court appears to have rested its decision chiefly upon acquiescence by Indiana in the exercise of jurisdiction by Kentucky over the land in question. That decision was rendered 76 years ago and there is no reason to believe that the location of the 1792 low-water mark has become more susceptible to accurate establishment since that time.

It is obvious that in view of the fact that it is impossible to specify with certainty where the 1792 low-water mark is situated today, the only practical and reasonable approach is to consider that Kentucky's boundary extends to the low-water mark on the present northern shore. This seems to be the statement of the boundary adopted in cases decided subsequent to *Indiana v. Kentucky*, 136 U.S. 479, and must necessarily prevail in the absence of a controversy involving a particular tract where convincing evidence of an earlier vintage than 1896 is presented to show that the low-water mark on the present shore is not the same as the 1792 mark.

A decisive factor in favor of Kentucky in this case is the fact that the state of Ohio has for a great many years acquiesced in the exercise of jurisdiction by Kentucky on the Ohio River up to the low-water mark on the present north shore, so far as concerns licensing and regulation of fishing and intoxicating beverages and generally for purposes of claiming that the river up to that point lies within and is owned by Kentucky. Now after a considerable period of acquiescence in Kentucky's administrative determinations that the low-water mark on the present shore should be considered the boundary, Ohio sees fit to ask for permission to file this complaint. This court noted in *Indiana v. Kentucky*, 136 U.S. 479 that although the evidence of geologists and recollections of witnesses was unconvincing, vague and imperfect, the fact that Indiana had not for a long period of time asserted any claim to the island in question, whereas Kentucky had exercised jurisdiction over it, was conclusive:

> ". . . It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised

> jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises?. . . For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.
>
> . . . The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it. . . ."

After lengthy acquiescence Ohio has no standing at this time to claim that the determination of Kentucky officials that the low-water mark on the present shore is the boundary is erroneous, and that the 1792 low-water mark is differently located in some places along the river.

ARGUMENT II

OHIO HAS CONCURRENT JURISDICTION WITH THE STATE OF KENTUCKY OVER THE OHIO RIVER, BUT THIS JURISDICTION IS NOT JOINT AND EQUAL AND DOES NOT PREVENT KENTUCKY LICENSING STATUTES FROM BEING ENFORCED ON THAT PART OF THE RIVER LYING WITHIN ITS TERRITORIAL LIMITS.

The provision in the Virginia Compact of 1789 that the jurisdiction of Kentucky on the Ohio river shall be concurrent with the states which possess the opposite shores of

the river is not denied by Kentucky. In *Wedding v. Meyler*, 192 U.S. 573 (1904) it was noted:

> "That the states opposite to Kentucky have the jurisdiction, whatever it is, *over* the Ohio river, which the Virginia compact provided for, was not disputed by the majority of the Kentucky court of appeals, and has been recognized by this court and elsewhere whenever the question has come up."

The Kentucky Court of Appeals stated in *Nicoulin v. O'Brien*, 172 Ky. 473, 189 S.W. 724, 727 (1916):

> "It should not be forgotten that 'concurrent jurisdiction' does not include the sovereignty or ownership of the river. That jurisdiction is conferred, not for the purpose of destroying the title of either sovereign, but to render more efficient the policing of the stream, and to prevent the loss and confusion which would result from defeating actions by pleas to the jurisdiction, when it might be difficult to determine precisely where the act occurred."

The exact nature and extent of the "concurrent jurisdiction" is difficult to resolve and depends upon the circumstances of each case. In *Wedding v. Meyler*, 192 U.S. 573 (1904) it was held that "concurrent jurisdiction" conferred authority on the courts of states north of the Ohio River to serve process at any place on the river. But it was expressly pointed out that concurrent jurisdiction is jurisdiction "on" the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other state.

The principle that "concurrent jurisdiction" of two states over a river between them does not extend to objects attached or anchored to the bed of the river was affirmed in *McGowan v. Columbia River Packers Assoc.*, 245 U.S. 352.

In *Nicoulin v. O'Brien*, 245 U.S. 113 (1918) this Court held that "concurrent jurisdiction" does not mean joint juris-

diction and Kentucky may enforce its statutes relating to fishing on the river even though the opposite state, in that case Indiana, had not consented to such enforcement or enacted legislation concurring in it.

> "The territorial limits of Kentucky extend across the river to low-water mark on the northerly shore. Indiana v. Kentucky, 136 U.S. 479, 519, 10 Sup. Ct. 1051, 34 L.Ed. 329. And we think it clear that no limitation upon the power of that commonwealth to protect fish within her own boundaries by proper legislation resulted from the mere establishment of concurrent jurisdiction by the Virginia compact. . . ."

Miller v. McLaughlin, 281 U.S. 261 also holds that the grant of "concurrent jurisdiction" as to a river lying between two states does not deprive one state from legislating with respect to fishing and enforcing its statutes within its own territorial limits, even though the other state has not concurred in such legislation.

In *Nielsen v. Oregon*, 212 U.S. 315 it was held that there is a distinction between an act *malum in se* and one which is merely *malum prohibitum*, and where two states have "concurrent jurisdiction" over a river, the one first acquiring jurisdiction may prosecute and punish for any act which is *malum in se* and punishable by the laws of both states, and the judgment is a finality so that the person prosecuted cannot be tried again in either state. But one state having "concurrent jurisdiction" cannot prosecute a person for an act *malum prohibitum* by its own laws which was committed in territory located within the boundary of the other state and was done by authority of the latter. Applying that rule to the present case, the state of Ohio could not enforce its statutes requiring fishing or boating licenses upon the Ohio River south of the northern low-water mark against persons holding a Kentucky license, since the offense of operating without a license is *malum prohibitum*.

Kentucky has never denied the existence of concurrent jurisdiction with the state of Ohio on the Ohio River. The complaint proposed to be filed by Ohio does not allege that it has been denied the right to prosecute in its courts any offense malum in se committed upon any part of the river, or that its courts have been denied the right to serve process on the river. The only allegation to be found in the motion and briefs filed in this case is that Kentucky has denied the doctrine by attempting to require all Ohio residents owning and operating boats on the Ohio River to have Kentucky boating licenses, and by enforcing on the river its statutes requiring fishing licenses and statutes relating to intoxicating beverages. This action on the part of Kentucky is clearly authorized under the concept of "concurrent jurisdiction" by the holding in *Nicoulin v. O'Brien*, 248 U.S. 113, even though Ohio has not consented to such enforcement or concurred in the legislation.

CONCLUSION

The motion of the state of Ohio to be permitted to file its complaint against the state of Kentucky should not be granted for the reason that there is no dispute that the boundary of Kentucky extends to the low-water mark on the northwest shore of the Ohio River, and that the state of Ohio has concurrent jurisdiction with Kentucky on the river. Due to the obvious impossibility of determining precisely where the original 1792 low-water mark is currently located, the administrative determination of Kentucky officials that the low-water mark on the present shore should be considered to be the boundary is the only practical and reasonable approach. This determination should not be permitted to be attacked after long acquiescence by the state of Ohio, and particularly by evidence of a general nature relating to surveys made in 1896-1906 which cannot be said to establish the 1792 low-water mark or to constitute substantial or probative evidence of the location of such mark.

The decided cases indicate that Kentucky has never denied the existence of the concept of concurrent jurisdiction on the Ohio River, and there is no controversy presented by the complaint in this respect. It is not specified in what way Ohio may have been unlawfully denied the exercise of its proper jurisdiction on the river. All that is alleged is that Kentucky has enforced its licensing laws as to boating, fishing and intoxicating beverages on the river, and it is not

open to question that Kentucky can enforce such laws against anyone on the river south of the low-water mark on the northern shore, and may do so without the consent or concurrence of the state of Ohio since the river is admittedly within the territorial limits of Kentucky.

Respectfully submitted,

ROBERT MATTHEWS
ATTORNEY GENERAL OF KENTUCKY

JOHN B. BROWNING
ASSISTANT ATTORNEY GENERAL
Counsel for the Commonwealth of Kentucky

May 25, 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 27, Original

STATE OF OHIO.....*Plaintiff*

vs.

STATE OF KENTUCKY.....*Defendant*

ANSWER

COMES NOW, the Commonwealth of Kentucky by and through its Attorney General and answers the complaint in this action by stating that Defendant:

1. Admits the allegations in paragraphs 1 through 7 and 14 of the complaint.

2. Admits the allegations in paragraph 8 of the complaint, but denies that the low water mark line established by the survey of 1896-1906 is the same as or an approximation of the 1792 low water mark or that it constitutes evidence of the location of the 1792 low water mark.

3. Admits the allegation in paragraph 9 that the original dams and the new dams caused the waters of the Ohio River to rise and admits that in some places along the river the effect of this may have been to cover portions of the northerly shore, but Defendant does not have sufficient knowledge or informa-

tion to form a belief as to the extent of any such inundation and denies that the dams caused the shores or banks of the river to be moved further northerly to any appreciable extent, and denies that any such effect was manifested at all places along the river between the State of Ohio and Kentucky.

4. Admits that the 1792 north low water mark has been obscured, and no one knows or can ascertain by any means where the line would run today, but denies that this situation was caused by and has existed only since the increase in elevation of the water levels due to erection of dams from 1910 to date.

5. Admits the allegation in paragraph 11 that Kentucky has claimed in the past, and now claims, that the boundary line between it and the State of Ohio is the low water mark on the present northerly shore of the Ohio River, it being impossible to determine where the 1792 low water mark line is located, and Defendant does not have sufficient knowledge or information to form a belief as to the truth of the allegation that the 1792 northerly low water mark is located to the south of the low water mark on the present north shore.

6. Denies that Kentucky claims exclusive jurisdiction to the entire Ohio River.

7. Does not have sufficient knowledge or information to form a belief as to the truth of the allegation in paragraph 13 that the State of Ohio "has always claimed" that the boundary between it and Kentucky is the 1792 northerly low water mark, but denies that Plaintiff has ever heretofore asserted by proper proceedings that the 1792 south low water mark differs from the low water mark on the northerly shore and that Kentucky was exercising jurisdiction over territory deemed to be in the State of Ohio.

8. Admits that the State of Ohio has "concurrent jurisdiction" with Kentucky over the Ohio River.

FIRST DEFENSE

The low water mark on the present northerly shore of the Ohio River must continue to be considered the boundary line between the State of Ohio and the Commonwealth of Kentucky since the location of the 1792 low water mark is not known and cannot be ascertained, and surveys made over a century later are not probative evidence of the location of the 1792 line; citizens and law enforcement officials of both states would only be confused and misled to their detriment by relocation of the boundary somewhere farther out in the river on an unmarked line, whether slightly south of the bank or perhaps nearing in a few places the middle of the stream, and the sensible and practical approach is to regard the low water mark on the northerly shore as the boundary.

SECOND DEFENSE

The State of Ohio has acquiesced in the claim of Kentucky that the boundary between the states is the low water mark on the present northerly shore of the Ohio River, and has acquiesced in the exercise of jurisdiction by Kentucky pursuant to said claim, and Plaintiff is estopped from asserting that the boundary is otherwise located.

THIRD DEFENSE

The complaint does not set forth or attempt to describe any particular tract of land, island, sandbar, or portion of the riverbed which lies south of the low water mark on the present northerly shore, to which the State of Ohio claims title as against Kentucky, and the complaint presents no controversy over specific territory which this Court is asked to resolve and against which Kentucky may defend. The reference in the prayer of the complaint indicating that Plaintiff relies on charts 12 through 136 made by the Louisville District Engineer Office in 1911-1914 is not sufficient to inform Defendant of the specific areas in issue, since such charts do not show the present location of the low water

south line of 1896-1898, and a new survey must be made based on that date in order to re-establish the line and determine where it runs today. Plaintiff has the obligation to allege specifically the territory claimed by it and cannot place the burden on Defendant to find out which portion of its property is endangered. Since Plaintiff appears to be basing its case on the 1896-1898 low water mark line, it should be required to run a survey to re-establish such line and show which parts of the river it is claiming.

FOURTH DEFENSE

While the State of Ohio has concurrent jurisdiction with Kentucky over the Ohio River, this jurisdiction is not joint and equal and does not prevent Kentucky licensing statutes being enforced, without the concurrence of Ohio, on that part of the river lying within the territorial limits of Kentucky.

WHEREFORE, having answered, Defendant prays and moves that the Court:

1. Dismiss the complaint, or in the alternative require that it be made more specific as set out in Defendant's Third Defense;

2. Establish the boundary line between the State of Ohio and the Commonwealth of Kentucky as the low water mark on the present northerly shore of the Ohio River;

3. Decree that the "concurrent jurisdiction" on the Ohio River possessed by Plaintiff does not mean joint and equal jurisdiction over the entire river and does not prevent Kentucky licensing statutes being enforced on that part of the river within its boundary.

Defendant prays any further relief as may be granted by this Court.

ROBERT MATTHEWS
ATTORNEY GENERAL OF KENTUCKY

JOHN B. BROWNING
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR THE COMMONWEALTH OF KENTUCKY

PROOF OF SERVICE

I, John B. Browning, Assistant Attorney General for the Commonwealth of Kentucky, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 10th, 1966, I served a copy of the foregoing Answer by depositing same in a United States Post Office with first class postage prepaid, addressed to the Governor and the Attorney General of the State of Ohio, at Columbus, Ohio.

John B. Browning
Assistant Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 27 Original

THE STATE OF OHIO,

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,

Defendant.

MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

The State of Ohio, by its Attorney General, asks leave of the Court to file an amended complaint against the Commonwealth of Kentucky, submitted herewith.

WILLIAM J. BROWN,
Attorney General of Ohio,

DONALD B. LEACH,
Executive Assistant to the Attorney General,

JOSEPH M. HOWARD,
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State House Annex,
Columbus, Ohio 43215

Counsel for Plaintiff,
The State of Ohio.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 27, Original

THE STATE OF OHIO,

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,

Defendant.

AMENDED COMPLAINT

The State of Ohio, by its Attorney General, brings this action against the Commonwealth of Kentucky, and for its causes of action states:

1. The jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States, and under Section 1251 (a) (1), Title 28, United States Code.

2. The plaintiff, since the 1st day of March, 1803, to the present, has been a State of the United States.

3. The defendant, since the 1st day of June, 1792, to the present, has been a State of the United States.

4. The State of Ohio was established pursuant to Article 5 of the Ordinance of July 13, 1787, adopted by Congress for the government of the territory of the United States northwest of the river Ohio. This act is known as the "Ordinance of 1787".

5. The Commonwealth of Kentucky, which was originally included within the Commonwealth of Virginia, was established pursuant to an act of the General Assembly of Virginia, entitled "An Act concerning the erection of the district of Kentucky into an independent state," passed on the 18th day of December, 1789. This Act, known as the "Virginia-Kentucky Compact", was approved by Congress on February 4, 1791, to become effective on June 1, 1792.

6. The various acts which resulted in the establishment of the two States described the boundary between them only as the Ohio River. It has never been determined authoritatively where that boundary lies in the Ohio River. Ohio has claimed that it lies in the middle of the River; or, at least, that it lies at the low water mark on the northerly side of the River as it existed in the year 1792. Kentucky has claimed that the boundary lies at the present low water mark on the northerly shore.

7. The question of the boundary line between the two states has become acute in recent years because of a considerable rise in the water level in the Ohio River. During the period from 1910 to 1929 the United States Government, acting through the Army Corps of Engineers, erected a series of dams in the Ohio River for navigational purposes. The result was a

rise in the general level of the River and permanent inundation of various areas on the Ohio shore. From 1885 to the present time the Corps of Engineers has been replacing the original dams with new ones which are higher, are designed to achieve better navigational conditions. These new dams are causing, and will cause, the permanent inundation of much greater areas on the Ohio shore.

I

1. The claim of the Commonwealth of Kentucky to a boundary at the low water mark on the northerly shore of the Ohio River is founded upon the fact that Kentucky was still a part of the Commonwealth of Virginia between 1774 and 1784, during the Revolutionary War and during the period when the United States were operating under the Articles of Confederation. At that time the Commonwealth of Virginia claimed title to the land on both sides of that part of the Ohio River which now flows between Kentucky and Ohio. This claim of title was violently opposed by many others of the thirteen original States, several of whom had conflicting claims of title to the same territory north of the Ohio River. The Continental Congress, fearing disintegration of the Union, refused to decide the question of title, and suggested that the individual States surrender their claims of title to the United States for the good of all. All of the claimant States eventually did so. Thus, the representatives of Virginia in the Continental Congress, on March 1, 1784, pursuant to an act of the General Assembly of the Commonwealth of Virginia, ceded to the United States, for the common good of all the States, all Virginia's "right, title, and claim" to the land northwestward of the Ohio River. This act, known as the "Cession of Virginia", was a compromise of Virginia's claim of title.

2. Despite its claim, the Commonwealth of Virginia actually had no title to the land north of that portion of the Ohio River which now flows between Kentucky and Ohio. Virginia's claim rested upon the terms of a charter issued by King James I to the London Company in 1609, which charter, beginning from certain specified points on the Atlantic coast, purported to grant to the Company all the continental lands "from sea to sea, west and northwest." It is obvious from historical records that King James had no conception of the distance between the Atlantic and the Pacific Oceans, and that he had no intention of granting such an enormous expanse of territory. Furthermore, regardless of the validity of Virginia's original claim, its extent was sharply curtailed by subsequent events. The charter of the London Company was revoked in 1624, and Virginia became a crown colony; shortly after 1650 the French moved into the middle of the continent and for almost a hundred years held control of the Mississippi and the Ohio valleys until driven out by the British during the French and Indian War; by the Treaty of Paris, which terminated that war in 1763, the French ceded to the British Crown the entire eastern Mississippi valley north of the Ohio River and west of the Allegheny Mountains; by a royal Proclamation, issued on October 10, 1763, the British Crown reserved all of that land to the Indian tribes which had assisted the British in the war, and confined the American colonies to the eastern side of the Allegheny Mountains; by the Treaty of Fort Stanwix, concluded between the British Crown and the Indians of the Six Nations, in November, 1768, the boundary between the Indian lands and the colonies was pushed westward across the mountains to a line drawn from northwestern Pennsylvania down the Allegheny and the Ohio Rivers, but the colonists were still forbidden to go north and west of that line; and by the Quebec Act, enacted by parliament and approved by the Crown in 1774, all the territory north and west of the Ohio

River was made a part of the Province of Quebec.

2. The Commonwealth of Virginia did not, at the time of its so-called Cession, have title to the land on the north side of that part of the Ohio River which now flows between Kentucky and Ohio. Virginia was not, therefore, the common proprietor of both sides of the Ohio River, and its boundary ran at most, to the middle of the River. The Commonwealth of Kentucky, being successor to Virginia, is entitled to no more.

II

1. In the alternative, should the Court decide that the boundary line lies at the low water mark on the northerly side of the Ohio River, that line should be established at the low water mark as it existed in 1792 when the Commonwealth of Kentucky became a State.

2. The low water mark, as of 1792, on the northerly side of that portion of the Ohio River which flows between Kentucky and Ohio can be established by satisfactory evidence.

3. From 1896 to 1908 the United States Army Corps of Engineers, in preparation for construction of the series of navigational dams referred to above, made a comprehensive, reliable, and monumented survey of the Ohio River, establishing the low water marks of the River as a part thereof.

4. The location of the low water mark on the northerly side of the Ohio River for over a hundred years prior to the Corps of Engineers' survey can be determined by the records of a number of other surveys, beginning with one made in

1766, under orders of Lieutenant General Thomas Gage, commanding general of the British forces in North America, by Captain Harry Gordon, his Chief Engineer, and Lieutenant Thomas Hutchins.

5. Engineering studies comparing these earlier surveys with that of the Corps of Engineers show that, from 1766 until the construction of the navigational dams, there was no appreciable variance in the course of the Ohio River between the Commonwealth of Kentucky and the State of Ohio, and no appreciable variance in the low water mark on the northerly shore of the River.

6. The recent elevation of the low water mark on the northerly shore of the Ohio River, caused by the construction of the various navigational dams, did not result in an accretion of territory to the Commonwealth of Kentucky.

III

1. Under the authority of Article 4 of the Ordinance of July 13, 1787, by which Congress provided for the government of the territory of the United States northwest of the Ohio River, the navigable waters leading into the Mississippi River, including, of course, the Ohio River, "shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, import, or duty therefor."

2. Under the authority of Paragraph 11 of the Virginia-Kentucky Compact, which was approved by Congress, "***the use and navigation of the river Ohio, so far as the territory of

the proposed state [Kentucky], or the territory which shall remain within the limits of this commonwealth [Virginia] lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this commonwealth, and of the proposed state on the river aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river."

3. In reliance upon these enactments of Congress, the State of Ohio has always claimed that it has concurrent jurisdiction with the Commonwealth of Kentucky over that portion of the Ohio River which flows between the two States.

4. The Commonwealth of Kentucky, while conceding that the jurisdiction of the State of Ohio over the Ohio River is concurrent with her own, nevertheless insists that the jurisdiction of the State of Ohio is not joint and equal. By acts and statements of its officials the Commonwealth of Kentucky, in effect, claims exclusive jurisdiction over the entire Ohio River.

All efforts to resolve these disputed issues by compact have failed, and the original jurisdiction of this Court is invoked because there is urgent need for prompt and final settlement of the controversy.

WHEREFORE, the State of Ohio prays that a decree be entered declaring its rights against the Commonwealth of Kentucky, to wit:

1. that the boundary line between the two States lies at the middle of the Ohio River; or

2. in the alternative, that the boundary line between

the two States lies at the low water mark on the northerly shore as that mark existed in 1792; and

3. that the State of Ohio and the Commonwealth of Kentucky have concurrent jurisdiction over that part of the Ohio River which flows between them; and

4. for such further relief as may seem proper to this Court.

Respectfully submitted,

WILLIAM J. BROWN,
Attorney General of Ohio,

DONALD B. LEACH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27, Original

THE STATE OF OHIO,

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

In its original complaint the State of Ohio conceded that it had been established from land ceded by the commonwealth of Virginia to the United States in the Cession of 1784; that Virginia, being the original proprietor on both banks of the Ohio River, retained a boundary line at the low water mark on the River's northerly side; and that the Commonwealth of Kentucky, having been formed from Virginia, succeeded to Virginia's rights. As a result of further research, and in view of the new high level dams, we are now forced to conclude that Virginia had no title in 1784 to any of the land on the north bank of that part of the Ohio River which flows between Kentucky and Ohio; that Virginia surrendered nothing but a baseless claim by her so-called Cession; and that the true boundary line between

the Commonwealth of Kentucky and the State of Ohio lies in the middle of the River. We ask leave to amend our complaint, therefore, so that the Court may be able to enter a judgment on the full scope of the merits of this controversy.

We respectfully submit, (1) that this Court has always decided boundary disputes between States upon the merits wherever possible; (2) that the present controversy between Kentucky and Ohio has never been authoritatively decided; and (3) that the evidence to support the conclusion that the boundary line lies in the middle of the Ohio River is overwhelming.

I

THIS COURT WILL DECIDE A BOUNDARY DISPUTE BETWEEN STATES UPON THE MERITS WHEREVER POSSIBLE.

Boundary disputes between States, although essentially political in nature (cf. Rhode Island v. Massachusetts, 12 Pet. 657, 736-751 (1838), and dissent by Chief Justice Taney, at pp. 752-754), have been specifically committed to this Court's jurisdiction by Article III, Section 2, Clause 2, of the Constitution. Because of the delicate nature of such cases this Court has consistently held that they are to be handled "with a view to public convenience and the avoidance of controversy." *Vermont v. New Hampshire*, 289 U. S. 593, 606 (1932), quoting *Handly v. Anthony*, 5 Wheat. 374, 383 (1820). The proceeding is equitable in nature, but "it will be the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a final hearing on its real merits. It is too important in its character, and the interests concerned are too great to be decided upon the mere technicalities of chancery pleading. * * * [A]nd in a case like the present, the

most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength." *Rhode Island v. Massachusetts*, 14 Peters 210, 257 (1840). "The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislatures of either state alone. [Citation]. Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits, with which we proceed to deal. [Citations]." *Virginia v. West Virginia*, 220 U. S. 1, 27 (1910).

In a later proceeding in the case just cited, West Virginia, over the objection of Virginia, sought leave to file a supplemental answer. This Court conceded that, under the circumstances of West Virginia's motion, the ordinary rules of procedure would render it impossible to grant the request, had it been made in a case between ordinary litigants. However, since the disputants were States, the Court said, *Virginia v. W. Virginia*, 234 U. S. 117, 121 (1913):

> We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should

not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving state, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

See also similar rulings in the same case at 222 U. S. 17 (1911) and 231 U. S. 89 (1913).

II

THE PRESENT BOUNDARY DISPUTE BETWEEN KENTUCKY AND OHIO HAS NEVER BEEN AUTHORITATIVELY DECIDED.

Shortly after the Declaration of Independence the permanence of the confederacy of the thirteen original States was seriously threatened by a dispute in the Continental Congress concerning the title to, and the disposition of, the lands north and west of the Ohio River which ultimately became the Northwest Territory. Virginia, New York, Massachusetts and Connecticut, relying upon original charter grants from the King, presented to Congress conflicting claims of title either to the whole, or to parts of these vacant western lands. Other States

whose western boundaries had been definitely fixed in their charters, notably Pennsylvania and Maryland, argued that title to the western lands lay in the British Crown, and that it had devolved upon the United States at the signing of the Declaration of Independence. Maryland refused to sign the Articles of Confederation until some satisfactory disposition had been made of the question. On November 3, 1781, a committee, appointed by Congress to study the various claims, submitted a report denying the validity of Virginia's claim of title and affirming the claim of New York. This report came before Congress for consideration on May 1, 1782, but no action was ever taken on it. Instead, Congress, fearful that the disputes would dissolve the confederacy of the States, refused to decide the issue of title, and urged all the States who had claims to vacant lands to cede them to the United States for the common good. All, including Virginia, did so, leaving the question of Virginia's title, and, coincidentally, of its boundary in the Ohio River, undecided.[1]

It has been said that the Kentucky-Ohio boundary has been settled by a series of cases in this Court,[2] beginning with *Handly v. Anthony, supra*. But all of those cases involved the boundary line between Indiana and Kentucky, and Ohio, not being a party to any of those cases, is not bound by them. Furthermore, the issue that Ohio now seeks to raise, i. e., that its boundary with Kentucky lies at the middle of the Ohio River,

[1] H. B. Adams, *Maryland's Influence on Land Cessions to the United States*, Johns Hopkins University Studies in History and Political Science, Third Series (Vol. III) pp. 7-64; Jensen, *The Cession of the Old Northwest*, 23 Mississippi Valley Historical Review, pp. 27-48; Jensen, *Creation of the National Domain*, 26 Mississippi Valley Historical Review, pp. 323-342; Hinsdale, *The Old Northwest*, pp. 303-354.

[2] This was the position taken in our original complaint.

was never properly before the Court in any of the Indiana-Kentucky cases. The *Handly* case arose from a dispute between two private parties over a tract of land projecting into the River from the Indiana side, the one party claiming under a grant from Kentucky, the other from Indiana. The question was whether the land lay within Indiana or Kentucky. Chief Justice Marshall, writing for the Court, stated the law to be that, where a river is the boundary between two states, each holds to the middle of the stream, if neither was the original owner of the entire river; but, when one state is the original proprietor on both sides and divests itself of the territory on one side only, the original state retains the entire river within its boundaries. 5 Wheat. 379. Then, having simply *assumed* that Virginia had title to the Northwest Territory at the time of her Cession in 1784, Chief Justice Marshall held that Virginia retained title to the entire Ohio River. 5 Wheat. 376-379. However, since a "river" was defined to be only the flowage between the normal low marks, and since the land in question lay above the low water mark on the Indiana side, the Court ruled in favor of the Indiana claimant. It does not appear that the Indiana party made any argument that the Indiana boundary extended to the middle of the Ohio River, or that he challenged the Court's assumption of Virginia's title to the Northwest Territory, and, of course, this was unnecessary in view of the outcome.

The second case was a boundary dispute between the State of Indiana and the Commonwealth of Kentucky, again as to a tract of land lying close to the Indiana bank of the River. *Indiana v. Kentucky*, 136 U. S. 479 (1889). An examination of the record in this Court (No. 2, Original, 1889 Term) shows that, when the evidence was heard by commissioners appointed by

the Court, the only issue appeared to be whether the tract in question lay above, or below, the low water mark on the Indiana side. Upon argument before this Court, however, Indiana urged, without having laid any foundation in the record, that her boundary with Kentucky lay in the middle of the Ohio River. 136 U. S. 488-493. The Court brushed this contention aside by reference to its decision in *Newby*, 136 U. S. 506-508, and made the same assumption that Kentucky's territory extended to the low water mark on the northwest side of the River because she had "succeeded to the ancient right and possession of Virginia, * * *." 136 U. S. 508. These two decisions were followed without re-examination in *Henderson Bridge Co. v. Henderson*, 173 U. S. 592 (1899), and in *Wedding v. Meyler*, 192 U. S. 573 (1904).

The brief for the State of Indiana in *Indiana v. Kentucky*, supra, pointed out that the State of Ohio claimed that its boundary line with Kentucky lay in the middle of the Ohio River, and that Ohio regarded Chief Justice Marshall's language on that aspect of the *Newby* case as *dicta*. 136 U. S. 480; and see the brief in this Court's records, pp. 18-25. Ohio's position has been most thoroughly presented in an extraordinary argument made by Samuel F. Vinton before the General Court of Virginia in *Commonwealth v. Garnier*, 44 Va. 655 (1846). This was a case in which citizens of Ohio had been indicted for aiding Virginia slaves to escape across the Ohio River. Mr. Vinton, who had been asked by the Governor of Ohio to represent the defendants, contended that the boundary lay in the middle of the River and that the alleged criminal acts had taken place in Ohio territory. The Virginia court held that, under this Court's decision in *Newby*, the boundary lay at the low water mark on the Ohio side; but, since the jury had found that the alleged acts occurred above the low water mark, the court held that they

took place in Ohio and the indictment was dismissed.[3]

For other expressions of the Ohio view, see *Booth v. Shepherd*, 8 Ohio St. 244, 248 (1858); *Sebastian v. Covington & Cincinnati Bridge Co.*, 21 Ohio St. 451, 452, 456 (1871); *Covington & Cincinnati Bridge Co. v. Mayer*, 31 Ohio St. 317, 326-328, 329 (1877). See also the opinion of Mr. Justice Brewer, while still a district judge, in *St. Joseph & G. I. R. R. Co. v. Devereaux*, 41 F. 14.

III

THE EVIDENCE THAT THE BOUNDARY LINE LIES IN THE MIDDLE OF THE RIVER IS OVERWHELMING.

The claim of the Commonwealth of Kentucky to practically the entire Ohio River, through that portion of its course which runs between Ohio and Kentucky, rests upon Virginia's ancient claim of title to the land which lies to the north of that section of the River. Virginia's claim of title rests, in turn, essentially upon one British document, i. e. the charter granted to the London Company in 1609 by King James I, the terms of which were broad enough to include a vast tract from the Atlantic to the Pacific including what ultimately became the Northwest Territory.

[3]Mr. Vinton's lengthy argument has been printed several times, most recently in 4 Ohio Archeological and Historical Publications 84-126. The various opinions of the Virginia judges in the *Garner* case cover over 130 pages of the reporter's volume (44 Va. 655-786) but they do not give a true picture of Mr. Vinton's argument. It is interesting to note that the Commonwealth of Virginia was also dissatisfied with the *Handly* opinion. It argued that its boundary ran to the top of the bank on the Ohio side.

Such grants have frequently been described as "extravagant" and "absurd." See the opinions of Chief Justice Marshall in *Worcester v. Georgia*, 6 Pet. 515, 544 (1832), and *Johnson v. McIntosh*, 8 Wheat. 543, 592 (1823). But, whatever may have been the validity of the original grant, other British documents show that the charter was revoked and that the western boundary of the Colony of Virginia was sharply restricted.

In 1624 the King, dissatisfied with the London Company's management of the colony, instituted a *quo warranto* proceeding which resulted in a decree revoking the charter, and Virginia became a Crown colony. 1 Marshall, *George Washington*, page 55. Thereafter, the French, moving down from Canada and up from New Orleans, took over the middle of the continent for more than a hundred years until driven out by the British in the French and Indian War (1756-1763). By the Treaty of Paris, which terminated that War in 1763, the French ceded to the British Crown the entire eastern Mississippi valley north of the Ohio River and west of the Alleghany Mountains. Shortt and Doughty, *Documents Relating to the Constitutional History of Canada*, 1759-1791, p. 66. No part of that territory north of the Ohio River was ever thereafter attached by the Crown to the Colony of Virginia. On the contrary, the Crown issued a Proclamation on October 10, 1763, by which all the land west of the Alleghany Mountains was reserved for the Indian tribes who had assisted the British during the war, and the American colonies were specifically confined to the eastern side of the mountains. Illinois Historical Collections, Vol. X, *The Critical Period, 1763-1765*, pp. 39, 43-44. This caused great discontent among the colonists, and, as a result, in November 1768, the Crown entered into the Treaty of Fort Stanwix with the Indians of the Six Nations, by the terms of which the

the boundary between the Indian lands and the colonies was pushed westward across the mountains to a line running from northwestern Pennsylvania down the Allegheny and the Ohio Rivers. Again, the colonists were prohibited from crossing to the north and west of that line. The treaty was signed in the presence of a representative of Virginia. VIII *Documents Relative to the Colonial History of the State of New York*, pp. 135-137.[4] Finally, in 1774 the Quebec Act, enacted by Parliament and approved by the Crown, annexed all the territory north and west of the Ohio River to the the Province of Quebec. I *American Archives* 216-220, 914.

Virginia's leaders were well aware of the flimsiness of her title claim. George Washington, writing to an agent about possible claims to western lands, clearly realized that he could not obtain a valid title until the provisions of the royal Proclamation of October 1763, had been altered. *The Washington-Crawford Letters*, C. W. Butterfield, ed., pp. 1-5. And Madison, representing Virginia in the Continental Congress during the debate on the western lands wrote to Jefferson, at that time Governor of the State, urgently requesting that documentary proof of Virginia's title be forwarded to him. I *Papers of James Madison*, H. D. Gilpin, ed., pp. 106-109, 119-124. Jefferson was unable to comply.

We submit that the documentary proof alone, of which this Court can take judicial notice, is sufficient to establish that Virginia's boundary at the time of her Cession in 1784, so far as

[4]The line drawn by the Treaty of Fort Stanwix ran along the *south* and *east* bank of the Ohio River. See p. 136 of the above citation.

that portion of the Ohio River which flows between Kentucky and Ohio is concerned, went no farther to the north than the middle of the River.[5]

[5] It appears, from the course of this Court's decisions, that the middle of the river is the thalweg, or main channel of navigation. *Iowa v. Illinois*, 147 U. S. 1, 4-14; cf. *Arkansas v. Mississippi*, 250 U. S. 39, 45; *New Jersey v. Delaware*, 291 U. S. 361; cf. *Arkansas v. Tennessee*, 397 U. S. 66, supplemented, 399 U. S. 215. This is not a case like *Texas v. Louisiana*, No. 36, Original, Term, 1968, pending on motion for judgment, in which the boundary between the two States was specifically described as "the mid-dle" of the stream.

CONCLUSION

It is respectfully submitted that leave to file the Amended Complaint should be granted.

WILLIAM J. BROWN,
Attorney General of Ohio,

DONALD B. LEACH,
Executive Assistant to the Attorney General,

JOSEPH M. HOWARD,
Assistant Attorney General,

State House Annex,
Columbus, Ohio 43215,

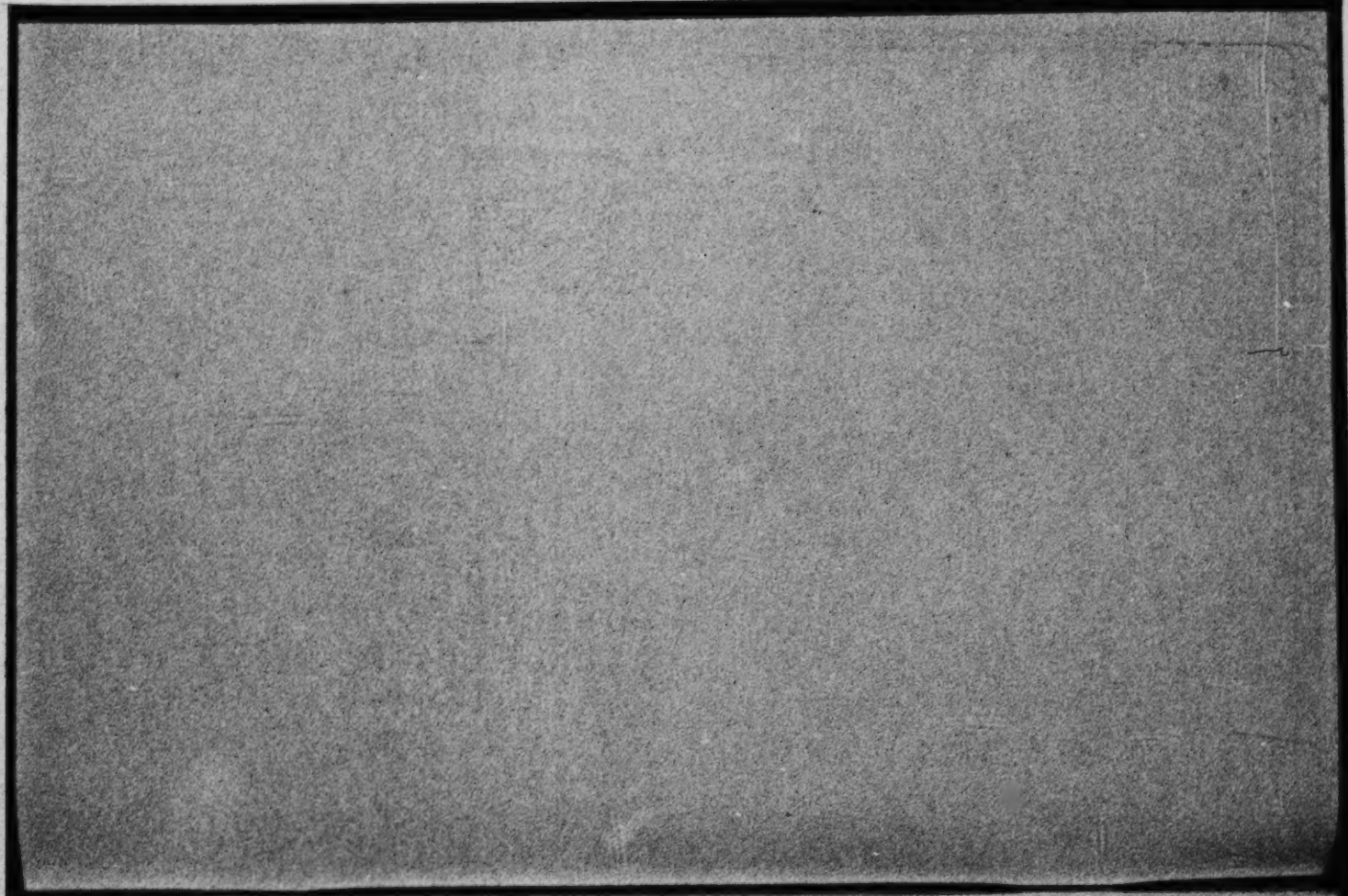
Counsel for Plaintiff,
The State of Ohio.

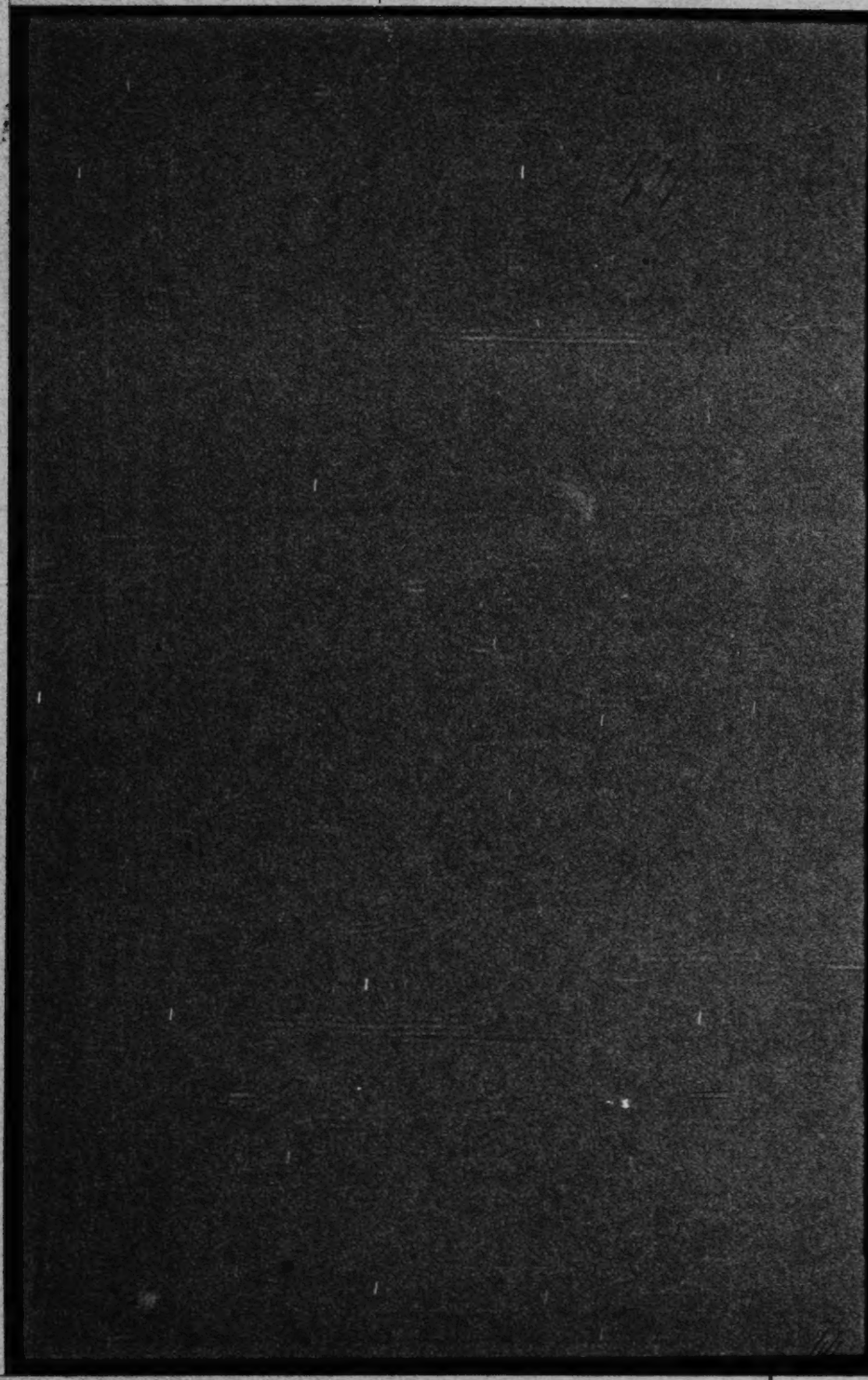
August, 1971.

CERTIFICATE OF SERVICE

I, Joseph M. Howard, Assistant Attorney General of The State of Ohio, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of August, 1971, I served copies of the foregoing motion for leave to file amended complaint, proposed amended complaint and brief in support, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
Assistant Attorney General





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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27 Original

STATE OF OHIO ..... PLAINTIFF

V.

STATE OF KENTUCKY ..... DEFENDANT

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

JOHN B. BRECKINRIDGE
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COUNSEL FOR DEFENDANT

IN THE

Supreme Court of the United States

(OCTOBER TERM, 1961)

No. 27, Original

STATE OF FLORIDA, Plaintiff,

v.

STATE OF GEORGIA, Defendant.

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ARGUMENT

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR LEAVE TO FILE SHOULD BE DENIED. 2-4

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 11, Original

STATE OF OHIO ..... *Plaintiff*

v.

STATE OF KENTUCKY ..... *Defendant*

QUESTION PRESENTED

WHETHER THE MOTION FOR LEAVE TO FILE AMENDED COMPLAINT SHOULD BE DENIED FOR FAILURE OF THE AMENDED COMPLAINT TO STATE FACTS UPON WHICH RELIEF CAN BE GRANTED.

STATEMENT

The State of Ohio instituted this proceeding in 1906 by filing its complaint in which it requested a declaration as to the location of the low water mark on the north shore of the Ohio River between Kentucky and Ohio, conceding that the low water mark on the north shore had been previously adjudicated as the boundary between the two states. Ohio has now moved the Court for leave to file an amended complaint, which is for all practical purposes an entirely new complaint, in which Ohio seeks to withdraw its previous concession that the low water mark of the Ohio River on the north shore is the boundary between the two states and seeks to establish the middle of the Ohio River as the boundary between the two states on the basis of matters allegedly occurring prior to the American Revolution.

ARGUMENT

A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND MOTION FOR LEAVE TO FILE SHOULD BE DENIED.

It is true as plaintiff suggests that some of the rules relating to practice are not as strictly applied in original actions between states in this Court as in ordinary litigation in the district courts. *See Utah v. United States*, 394 U.S. 89, 95 (1969). Nevertheless, it should be pointed out that this original action has been pending for a period which is now in its sixth year and that the amended complaint seeks relief which is not only significantly greater in amount than that sought in the original complaint, but is based on entirely new and different grounds. The first complaint in this boundary dispute sought merely to establish the location of the low water mark on the north shore of the Ohio River, which was conceded to be the boundary between the states of Kentucky and Ohio. The amended complaint seeks to establish the middle of the river as the boundary on the basis of events which allegedly occurred prior to the American Revolution.

Plaintiff candidly recognizes the concession made in the original complaint, that the north shore low water mark as the boundary between the states was settled by a series of cases in this Court (Brief in Support of Amended Complaint, page 14), but has now so substantially changed its position as to argue that the evidence that the boundary lies in the middle of the river is "overwhelming." (Id. p. 17) Kentucky submits that this contention is legally baseless.

Anthony, 18 U.S. 374 (1820). The rationale of that case was followed in *Indiana v. Kentucky*, 136 U.S. 479 (1890). In both of those cases this Court pointed out very clearly that the territory now comprising Ohio was originally a part of territory of the Commonwealth of Virginia which was ceded to the United States at the behest of Congress and subsequently divided into Ohio and other states. The basis for the low water mark on the north side as the boundary was the language of Virginia's cession of "the territory northwest of the river Ohio." In *Henderson Bridge Co. v. City of Henderson*, 173 U.S. 592, 613 (1899), this Court stated:

> "It must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio river."

Both Kentucky and Ohio courts have recognized the reasoning of those cases. See for instance *Commonwealth v. Henderson County*, Ky., 371 S.W.2d 27 (1963); *Booth v. Shepherd*, 8 Ohio St. (Critchfield) 243 (1858).

Ohio now argues that certain alleged treatments of subject territory by the British Crown and others prior to the American Revolution indicate that the territory was not a part of Virginia and that the reasoning of the Supreme Court cases referred to above is therefore unsound. However, assuming for the sake of argument that it could be contended that the subject territory was not a part of Virginia prior to the American Revolution, that would not detract from the reasoning of the decisions referred to above. After the American Revolution, all of the territory involved in this controversy was a part of the whole territory of the sovereign United States of America. It was pursuant to congressional action of the sovereign United States of America and the action of the Commonwealth of Virginia included within it that the subject territory was ceded to the United States Government and subsequently became in part the State of Ohio. The State of Ohio was created by law of the sovereign United States of America. That law clearly recognized the north-

CONCLUSION

In *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 445 (1945), this Court stated:

> "Leave to file should of course be denied if it is plain that no relief may be granted in the exercise of the original jurisdiction of this Court."

The motion for leave to file the amended complaint should be denied.

Respectfully submitted,

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

By: George F. Rabe
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COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I, George W. Mills, one of counsel for defendant herein and a member of the bar of the Supreme Court of the United States, hereby certify that service of the foregoing Brief in Opposition was made by depositing three copies each thereof in the United States mail, first class U.S. postage prepaid, addressed to William J. Brown, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215; Donald R. Leach, Executive Assistant to the Attorney General, State House Annex, Columbus, Ohio 43215; Joseph M. Hoffheld, Assistant Attorney General, State House Annex, Columbus, Ohio 43215, Counsel for Plaintiff, State of Ohio.

This 22nd day of October, 1971.

Assistant Attorney General

Supreme Court, U. S.
FILED
APR 18 1972
...AK, JR., CLE...

IN THE

Supreme Court of the United States

October Term, 1965
No. 27, Original

THE STATE OF OHIO,

Plaintiff

v.

THE COMMONWEALTH OF KENTUCKY,

Defendant

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE AMENDED COMPLAINT

PHILLIP FORMAN
Special Master

April 10, 1972

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1965
No. 27, Original

THE STATE OF OHIO,
Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant.

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE AMENDED COMPLAINT

E R R A T A

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1. Page 7, line 17: "acient" should be "ancient";

2. Page 9, line 18: "Lessee" should be italicized;

3. Page 9: below the last paragraph insert three asterisks;

4. Page 12, line 4: "boarder" should be "border";

5. Page 12, line 17: "Kentucky v. Indiana" should read "Indiana v. Kentucky";

6. Page 15, line 11: "dispusted" should be "disputed."

IN THE

Supreme Court of the United States

October Term, 1966 — No. 27, Original

THE STATE OF OHIO,
Plaintiff

v.

THE COMMONWEALTH OF KENTUCKY,
Defendant

REPORT OF THE SPECIAL MASTER UPON MOTION OF THE STATE OF OHIO FOR LEAVE TO FILE AMENDED COMPLAINT

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

On March 31, 1966, the plaintiff, State of Ohio, instituted an original action to locate the boundary between the States of Ohio and Kentucky on the Ohio River (River). The complaint recognized the northern boundary of the State of Kentucky as being "the low water mark on the northerly side of the Ohio River as it existed in the year 1792,"[1] but alleged that a series of dams constructed in 1910 and thereafter had caused the waters of the river to rise and inundate areas of Ohio, permanently raising the low water mark in areas along the northern shore of the River. It was further alleged that the State of Kentucky claimed ownership of the River to the new low water mark resulting from the higher level of its waters and exclusive jurisdiction over the entire River. The complaint prayed

1. Complaint, para. 8.

of the River has in Pre-Revolutionary historical documents which were said to be not prohibitively difficult to obtain for judicial scrutiny. At the same time, counsel for the State of Kentucky intimated that if permitted, the proposed amendment would necessitate the filing of a counterclaim for heavy expenditures made since 1792 north of the mid-point of the River. The propriety of permitting the proposed amendment to the complaint is the sole subject of this Report.

Shortly after this country won its independence, it became apparent that several states, including Virginia, claimed title to lands north and west of the Ohio River, from which the State of Ohio was later created. Fearing that a legislative attempt to resolve the conflict would severely threaten the newly formed bonds of union, Congress suggested that the states involved cede the disputed lands to the United States to become additional states. All of those states eventually complied with this request. Virginia did so in 1784, surrendering to the United States "all right, title and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying and being to the northwest of the river Ohio . . ." on the condition only that the land be formed into states.[3] The State of Ohio was established from this ceded territory pursuant to Article 5 of the Ordinance of 1787, which provided for the government of the northwest territories.[4] When admitted to the Union in 1802,[5] her southern boundary was described simply as bounded "on the south by the Ohio river, to the mouth of the Great Miami River.

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3. 1 Laws of the United States 472, 474 (B. & D. ed. 1784).

4. 1 Laws of the United States, 478, 480 (B. & D. ed. 1787).

5. Although Ohio was officially admitted to the Union on November 29, 1802, the state government did not begin to operate until March 1, 1803, and in 1953 Congress fixed the later date as the official day of admission. Ammann, Francis R., and Harvey Walker, The Government and Administration of Ohio, (1956), p. 27.

States. The court was thus called upon to settle the conflict of boundary between Kentucky and Indiana on the Ohio River. It held that resolution of the issue turned on the extent of land retained by Virginia after her cession of the territory north and west of the Ohio, from which Indiana as well as Ohio was formed, to which Kentucky succeeded as proprietor, reasoning as follows:

> . . . it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the north-west of the river Ohio.' And this territory, according to express stipulation, is to be laid off into independent states. These states, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it, Virginia must have had in view the convenience of the future population of the country.
>
> *"When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only."* (Emphasis added).[11]

Reasoning that Virginia was the original proprietor of both sides of the River, the Court held that after its cession of the northwest territory, Virginia retained title to the River up to the low water mark on the north shore, and that Kentucky, therefore, succeeded to the same rights when she became a state in 1792. Thus the land in question was held to lie within the State of Indiana.

This holding is now challenged by the State of Ohio on the grounds that (1) the reasoning of the Court was in

11. *Id.* at 378.

error, (2) Ohio was not party to the proceedings, and (3) Ohio has always contested the placement of Kentucky's boundary at the low water mark on the northern shore. Basically, Ohio argues that Virginia never held good title to the lands she surrendered to the United States and therefore Virginia, and her successor, Kentucky, never had title to more than the middle of the River.

In the more than 150 years since the Court's decision in *Handly*, Kentucky has consistently claimed ownership to and exercised dominion over the Ohio River to the low water mark on the northern shore. Ten years before *Handly* was decided, the Kentucky Legislature enacted a statute to quiet questions over the extent of its ownership on the Ohio River which clearly set forth its claim of sovereignty over it. The act stated:

> "Whereas doubts are suggested, whether the counties, calling for the River Ohio as the boundary line, extend to the state line, on the north west side of said river, or whether the margin of the south east side, is the limit of the counties, to explain which
>
> "Sec. 1 *Be it enacted, by the General Assembly*, That each county of this Commonwealth, calling for the river Ohio, as the boundary line, shall be considered as bounded in that particular by the state line on the north west side of said river, and the bed of the river and the islands, therefore shall be within the respective counties, holding the main land opposite thereto, within this State, and the several county tribunals, shall hold jurisdiction accordingly."[13]

Similar language by the Revisor of the Kentucky Statutes in 1944 contained the comment:

> "The boundary with Ohio, Indiana, and Illinois begins at a point where a line running through the center of

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13. 1 Statute Law of Kentucky 303 (1834). See, Laws of Kentucky 189 (1810).

the Big Sandy River intersects the low water mark on the northern shore of the Ohio River; thence it runs in a westerly direction along the northern or northwestern shore of the Ohio, to a stake on the bank of the Ohio river . . . ."[13]

Decisions of the Kentucky courts, however, demonstrate her continuing claim to the waters of the Ohio River.[14]

During the long period following *Handly*, the Court on several occasions affirmed and followed its holding in that case. In *Indiana v. Kentucky*[15] a dispute between the States of Kentucky and Indiana over a claim of ownership to an island on the north side of the Ohio River again raised the question of the limits of Kentucky's sovereignty over the River. After reviewing the events surrounding Virginia's claim to the northwest territory, and the cession of Virginia in 1784, the Court, relying on *Handly*, concluded that Kentucky "succeeded to the acient right and possession of Virginia"[16] and that its boundary extended to the low water mark on the northern shore of the River.

Henderson Bridge Co. v. Henderson City,[17] decided nine years after *Indiana v. Kentucky*, involved a determination of the extent of power of a Kentucky municipality to tax a railroad bridge spanning the river between Kentucky and Indiana, which raised the issue of the extent of dominion Kentucky possessed over the River. After dis-

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13. Notes and Annotations to the Kentucky Revised Statutes (1944), Title I, Chapter I, p. 2.

14. *Commonwealth v. Henderson County*, 371 S.W.2d 27 (1963); *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W.2d 119 (1954); *Shannon v. Streckfus Steamers*, 279 Ky. 649, 131 S.W.2d 833 (1939); *Church v. Chambers*, 3 Dana 279; *McFarland v. McKnight*, 6 B. Mon. 500, 510; *Fleming v. Kenny*, 4 J. J. Marsh 155, 158; *McFall v. Commonwealth*, 2 Met. (Ky.) 394.

15. 136 U.S. 479 (1890).

16. *Id.* at 508.

17. 173 U.S. 592 (1899).

cussing *Handly, Indiana v. Kentucky*, and their historical background, the Court held that:

> "Upon this question of boundary nothing can be added to what was said in the cases cited, and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River."[18]

Also, in a memorandum decision, the Court in *Nicoulin v. O'Brien*,[19] held that Kentucky could prohibit citizens of Indiana from seining for fish in the River south of the low water mark on the northern shore, stating that the "territorial limits of Kentucky extend across the river to low-water mark on the northerly shore."[20] Other cases which involved the location of state boundaries and the sharing of jurisdiction on River waters, have also discussed and followed the reasoning in *Handly*.[21]

Despite the long passage of time, the legislative and judicial pronouncements of the State of Kentucky, and the decisions of the Supreme Court, holding Kentucky's boundary at the low water mark on the northern shore, Ohio only now asserts the claim that its dominion extends to the middle of the River. As a defense to this extended period of inaction, the petition to amend alleges, as mentioned above, that Ohio is not bound by the decisions of the Supreme Court because it was not a party to those proceedings and has always protested the presently fixed boundary of Kentucky. Ohio cites several cases to support this position. Yet, they only strengthen the contrary conclusion, that the Ohio courts have, for many years, followed the reasoning of *Handly* and accepted Kentucky's territorial limits as being at the low water mark on the northern shore of the River.

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18. *Id.* at 615.
19. 268 U.S. 113 (1918).
20. *Id.* at 114.
21. *Wedding v. Meyler*, 192 U.S. 573 (1904); *Alabama v. Georgia*, 23 How. 505, 514 (1850).

Booth v. Hubbard,[22] one of the cited cases, was a wrongful death action brought after the drowning of plaintiff's decedent in the Ohio River. It was argued that the decedent had died within the territorial limits of Kentucky and, therefore, the action could not be maintained in the Ohio courts. The Supreme Court of Ohio, in discussing where the boundary lay between Kentucky and Ohio, stated that:

> "For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784."[23]

The court went on to discuss the interpretation of the Cession of Virigina in *Handly*, stating further that:

> ". . . the construction thus given to the Virginia deed of cession has been uniformly sanctioned and affirmed by the courts of this state. In Lessee *of McCullock v. Aten*, 2 Ohio Rep. 308, the court say: 'The state is bounded by the Ohio River; but it can scarcely be supposed that the beach, below the break of the bank, is not within her jurisdiction. In the case of *Handly's Lessee v. Anthony*, this doctrine is distinctly recognized by the supreme court of the United States, as being a rule of boundary. And it is one to which this court have always adhered.'"
>
> * * *
>
> "The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

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22. 8 Ohio St. 243 (1858).
23. Id. at 245.

"In point of fact dominion has never been exercised by Virginia on this side of the river, since her deed of cession, but has uniformly been exercised by this state, to the line of low-water, during the whole period of her existence, and the question should now be regarded as settled."[24]

Although not cited by Ohio, *Blanchard v. Porter*,[25] decided more than 25 years earlier than *Booth v. Hubbard*, contained similar reasoning. There the issue before the Supreme Court of Ohio was whether a citizen of Ohio could convey by deed the land between the high and low water marks on the Ohio River. In the course of its reasoning the court stated:

> "Nor is it a question, whether the deed to the plaintiff conveys the land and water, to the centre of the river, since Virginia only granted the territory on the northern bank of the river, to low water mark; although, by the compact of 1792, between Virginia and Kentucky, a *concurrent jurisdiction* over the river is accorded to Ohio and Kentucky." (Emphasis in original).[26]

And, citing this case and others in *Wedding v. Meyler*,[27] the Supreme Court observed that "In the Ohio decisions, it is apparent that the jurisdiction exercised by the State over the Ohio River is based on the Virginia compact."[28]

In two other cases introduced by Ohio, the first, *Sebastian v. Covington & Cincinnati Bridge Co.*,[29] involved a question of the extent of Ohio's power to tax a bridge which had been built by a Kentucky corporation chartered by the State of Ohio for that purpose, and the

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24. 12 at 247-48.
25. 11 Ohio 138 (1841).
26. 11 at 148.
27. 148 U.S. 573 (1894).
28. 14 at 576-77.
29. 23 Ohio St. 951 (1873).

second, *Covington & Cincinnati Bridge Co. v. Mayer*,[30] raised the issue of the extent of Ohio's taxing power over the same bridge pursuant to a revised Ohio statute which had altered the property base for taxation. In both cases counsel argued that Ohio's southern boundary lay at the middle of the river and its power to tax was coextensive thereto. The decisions of the Supreme Court of Ohio, however, concluding respectively that Ohio could tax the bridge to the middle of the River, and determining the appropriate property base for the tax, relied on provisions in the Ohio charter which granted permission for the building of the bridge. The court did not reach the question of where the boundary lay between the states. The other cases cited by Ohio to support the contention that it has always protested the placement of Kentucky's boundary at the low water mark on the northern shore also rely merely on counsels' arguments not reflected in the decisions of the courts.[31]

The acceptance by the Ohio courts of the Supreme Court's decisions in *Handly* and *Indiana v. Kentucky* setting the boundary of Kentucky at the low water mark on the northern shore undermines its contention that it is not bound by them because they involved conflicts between Indiana and Kentucky wherein Ohio was not a party. In addition, Ohio's assertion that those decisions were intended to locate the northern boundary of Kentucky on the Ohio River only as between Indiana and Kentucky assumes that the cession of the northwest territory and the Ordinance of 1787 contemplated different boundaries for the states to be carved on the north-

30. 11 Ohio St. 317 (1877).

31. Ohio refers to the brief for the State of Indiana in *Indiana v. Kentucky*, 136 U.S. 479 (1890) wherein it was "pointed out that . . . Ohio claimed that its boundary . . . lay in the middle of the Ohio River, and that Ohio regarded . . . language on that aspect of the *Handly* case as dicta." Ohio also refers to the argument for the State of Ohio in *Commonwealth v. Garner*, 44 Va. 655 (1846). Plaintiff's Brief in Support of Amended Complaint at 15-17.

boundaries. Such a plan would have resulted in a checkered River border for Virginia and little Kentucky. Aside from the sheer difficulty and practical unmanageability inherent in governing a border such as Ohio's argument suggests, this contention appears to be contrary to the intentions of the Congress and the states which participated in planning for the division of the northwest territory into states. It must be assumed that the adjudications in Kentucky and Indiana v. Kentucky, although resolving conflicts only between the States of Indiana and Kentucky, were intended to locate the boundary of Kentucky along its entire northern border. At the very least, Ohio was put on notice of the practical intent and consequences of these decisions and the jeopardy they posed to its claim of dominion on the River.

In holding that Kentucky was the rightful owner of the island in dispute in Kentucky v. Indiana, the Court reasoned:

> Above all the evidence of former transactions and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be . . . On that day, and for many years

afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. . . ."

"This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."[32]

The Court concluded by stating that:

"The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it."[33]

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32. 139 U.S. at 509-510.
33. 139 U.S. at 518.

The [illegible] seemed [illegible] in the daily course of dealings [illegible] between the States and their citizens to which the Court was responsible in [illegible] v. Kentucky upon a lapse of [illegible] seventy years, and even more compelling [illegible] the present case involving a lapse of more than 100 years. The considerations which Kentucky introduced to avoid previous precedent [illegible] are examples of the [illegible] elements of proof the proposed amendment to Ohio's complaint would create. Moreover, the reasoning and principles expressed in Indiana v. Kentucky have been followed by the Supreme Court to deny relief in cases of long delayed state claims to territory in a line of decisions. Thus, in Michigan v. Wisconsin,[1] the Court refused to reverse a mistake in a boundary description which had deprived Michigan of her rightful territory on the grounds that Michigan had known of the error for some sixty-four years and had stood by without objection while Wisconsin exercised dominion over the land. The Court stated that:

> "It is contended that the State of Michigan through all these years labored under a mistake in respect of the real facts and that this was the result of excusable ignorance on her part. The contention is devoid of merit. The material facts, since at least the date of the Wisconsin Enabling Act, [1836] have been so obvious that knowledge of them on the part of the Michigan authorities, if it were not shown, as it is shown, by the evidence, must necessarily be assumed.
>
> "Notwithstanding, the State of Michigan at this late day insists that the boundary now be established by a decree of this court in accordance with the description contained in her Constitution of 1908. Plainly, this cannot be done. That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued

[1] 270 U.S. 295 (1926).

and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, [citations omitted] and, *a fortiori*, to the quasi-sovereign states of the Union. The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority."[35]

In the cases where the Court did not find acquiescence in state claims to disputed territory, the conflict over the boundaries was both obvious and of long standing.[36]

In light of the decisions of the Supreme Court and those of the Ohio Supreme Court recognizing and accepting the northern boundary of Kentucky at the low water mark on the northern shore of the River, and on the basis of Kentucky's open and continuous assertion and exercise of dominion to that point without formal objection by Ohio for more than 150 years, it is my opinion that the pronouncement of the Court in *Indiana v. Kentucky* applies equally to Ohio, and it has for all practical purposes acquiesced in Kentucky's claim of sovereignty over the River to the low water mark on the northern shore.

It seems clear that Ohio, in its present posture, harking back to an alleged ancient defect in Virginia's title to the northwest territory in order to vacate the decision in *Handly* and Kentucky's historically fixed boundary, is attempting to challenge a settled rule of law which has been accepted by it for a century and a half. Recognizing that great latitude is to be extended in cases

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35. Id. at 307-308. *Vermont v. New Hampshire*, 289 U.S. 593, 613 (1933); *Maryland v. West Virginia*, 217 U.S. 1, 42-44 (1910); *Louisiana v. Mississippi*, 202 U.S. 1, 53-54 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 523 (1893); *Rhode Island v. Massachusetts*, 4 How. 591, 639 (1846).

36. *New Jersey v. Delaware*, 291 U.S. 361, 376-77 (1934); *Oklahoma v. Texas*, 272 U.S. 21, 46-47 (1926); *Arkansas v. Tennessee*, 246 U.S. 158 (1918).

involving litigation between the sovereign states.[7] It is nevertheless my opinion that the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action.[8] I therefore recommend that an order be entered denying the petition to amend the complaint of the state of Ohio.[9]

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[7] Virginia v. West Virginia, 241 U.S. 117, 121 (1915).

[8] 3 Wright & Miller, Federal Practice and Procedure §1315, 1316, 1357 (1969); 2A Moore, Federal Practice ¶12.08 (2d ed. 1968).

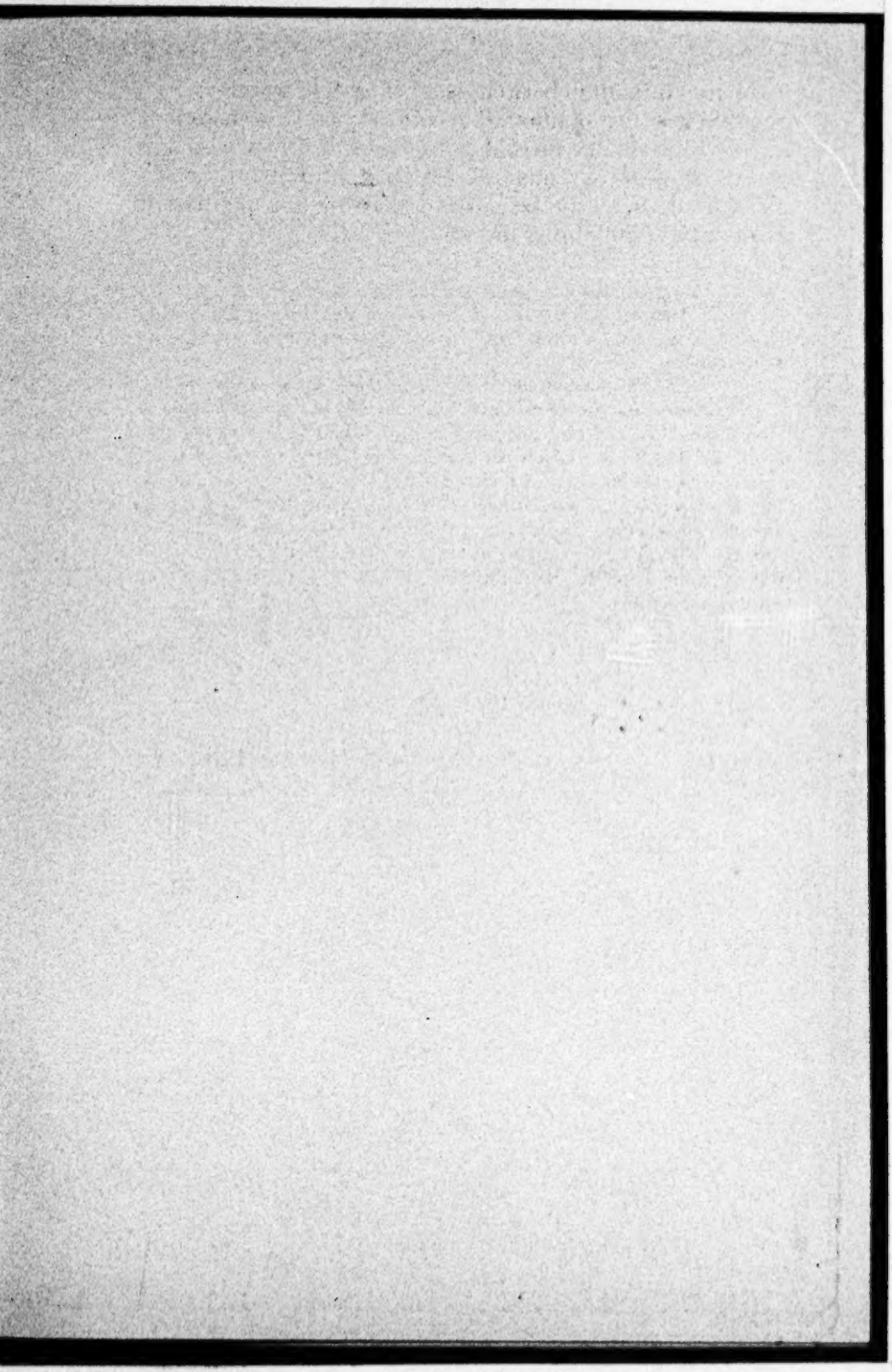
[9] Such a disposition of the petition to amend the complaint will not terminate this litigation since it contemplates but an alternative request for relief. Ohio intends to pursue its original cause of action to locate the boundary between the states at the low water mark on the southern shore of the River as it existed in 1792.

The necessity for a definitive resolution of the petition for leave to amend at this point, unfortunately enough it may be, appears justified from the standpoint of economy of time and expense as for the discretion of the application of 28 U.S.C. §1292(b) dealing with appeals of certain interlocutory orders.

Respectfully submitted,

/s/ PHILLIP FORMAN
Special Master

April 10, 1972



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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 27, ORIGINAL

THE STATE OF OHIO, PLAINTIFF

v.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT

EXCEPTIONS OF THE STATE OF OHIO TO THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972

Pursuant to the Court's order,[1] the State of Ohio presents the following exceptions to the Report of the Special Master filed May 15, 1972:

1. The State of Ohio excepts to the conclusion that the factual allegations of the proposed amended complaint fail, as a matter of law, to state a cause of action (Rep. 15).

[1] On May 15, 1972, the Court ordered: "The Report of the Special Master upon the motion of the State of Ohio is received and ordered filed. Exceptions, if any, in the supporting briefs may be filed within sixty days. Reply briefs, if any, may be filed within thirty days of the receipt of the exceptions." On July 7, 1972, Mr. Justice Stewart extended the time for filing the exceptions and supporting brief of the State of Ohio to August 14, 1972. The Report will be referred to herein as "Rep".

2. The State of Ohio excepts to the recommendation that the motion for leave to file the amended complaint should be denied (Rep. 16).

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio,

JOSEPH M. HOWARD,
Executive Assistant
to the Attorney General,

AUGUST 1972.

In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 27, ORIGINAL

THE STATE OF OHIO, PLAINTIFF

v.

THE COMMONWEALTH OF KENTUCKY, DEFENDANT

BRIEF OF THE STATE OF OHIO IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972

REPORT OF THE SPECIAL MASTER

The Report was filed in this Court on May 15, 1972. On that same date, the court ordered that any exceptions of the parties, with supporting briefs, be filed within sixty days. On July 7, 1972, Mr. Justice Stewart extended the time for filing the exceptions and supporting brief of the State of Ohio to August 14, 1972. The Court has original jurisdiction.

QUESTIONS PRESENTED

1. Whether the factual allegations of the proposed amended complaint state a cause of action.

2. Whether the motion for leave to file an amended complaint should be granted.

STATEMENT

This original action was initiated when the State of Ohio filed a complaint in this Court seeking a determination of the location of its boundary with the Commonwealth of Kentucky.[1] The only question presently before the Court is whether Ohio shall be permitted to file an amended complaint. The Special Master states in his Report:

> The propriety of permitting the proposed amendment to the complaint is the sole subject of this Report. (Rep. 8; see also Rep. 15-16.)

The Report finds (Rep. 3-4) that the federal and state enactments by which the two States were admitted to the Union simply described Kentucky as bounded on the north by the Ohio River, while Ohio was described as bounded on the south by the same River. Ohio has claimed that the boundary between the two States lies at the middle of the River; or, at least, that it lies at the low water mark on the northerly side of the River as it existed in 1792 when Kentucky became a State. Kentucky has claimed that the boundary lies at the present low water mark on the northerly shore. (A.C. 3.) The issue as to the exact location of the line has never been authoritatively decided in any court proceeding between the two States.

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[1] The complaint will be referred to as "C". The proposed amended complaint and the brief in support of the motion for leave to file, which are printed together in the same blue covered pamphlet, will be referred to, respectively, as "A.C." and "Br".

During the period from 1910 to 1929 the United States Government, acting through the Army Corps of Engineers, erected, for navigational purposes, a series of dams in the Ohio River. The result was a rise in the general water level and permanent inundation of various areas on the Ohio shore. From 1955 to the present time the Corps of Engineers has been replacing the original dams with new ones, designed to achieve better navigational conditions. These new dams are much higher and have produced a further rise in the level of the River. They are causing, and will continue to cause, the permanent inundation of much greater areas on the Ohio shore. (A.C. 3-4.)

The complaint of the State of Ohio was filed in this Court on March 31, 1966. The complaint admitted that the territory northwest of the Ohio River had been ceded to the United States by the Commonwealth of Virginia in her so-called Cession of 1789; that Virginia, as original proprietor of both banks of the River, retained a boundary line at the low water mark on the northerly side; that the Commonwealth of Kentucky, having been formed from Virginia, succeeded to Virginia's rights; and that this Court's decision in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), involving the line between Indiana and Kentucky, established Kentucky's boundary in the Ohio River. The complaint prayed that the boundary line between the two States be established at the low water mark on the northerly shore as that mark existed in 1792 (C. 2-4, 7-12).[3]

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[3] The complaint also prayed for a determination of the jurisdiction of the two States over the waters of the Ohio River (C. 4, 12-14). Under the terms of the Ordinance of July 13, 1787, by which Congress established a government for the territories of the United States northwest of the Ohio River, and under the terms of the Virginia-Kentucky Compact of 1789, which led to statehood for Kentucky, the two States had been granted "concurrent jurisdiction" over the River. The proposed amended complaint repeats the allegations of the original complaint on this branch of the case, but with some additions and clarifications (A.C. 7-8).

Kentucky's answer (p. 3) alleged that the boundary is the present low water mark on the Ohio shore. Furthermore, Kentucky's answer (p. 4), while conceding that Ohio's jurisdiction over the River is concurrent with her own, nevertheless insists that the jurisdiction of the State of Ohio is not joint and equal with that of the Commonwealth of Kentucky.

In view of the fact that the new high dams have the effect of elevating Kentucky's claimed border higher and higher up the Ohio shore, and in view of Kentucky's adamant refusal to consider any compromise, we have carefully researched the historical basis for Virginia's claim of title in 1784 to the lands north and west of the Ohio River, and we have carefully reexamined the reasoning of *Handly's Lessee* v. *Anthony*, *supra*. That reexamination and research led us to conclude that Virginia, in 1789, had no title to any of the land on the north bank of that part of the Ohio River which flows between Kentucky and Ohio; that Virginia surrendered nothing but a baseless claim by her so-called Cession; that Virginia was not, in 1784, the proprietor of both sides of the Ohio River; that the opinion in *Handly* simply assumed that Virginia was the original proprietor of both sides; and that, under the principles of boundary law laid down in *Handly*, the line between the Commonwealth of Kentucky and the State of Ohio lies in the middle of the River.

As a result of these conclusions, Ohio, on August 30, 1971, filed in this Court a motion for leave to file an amended complaint, attaching thereto the proposed new complaint and a brief in support of the motion. The brief made the following points: (1) that this Court will decide a boundary dispute between States on the merits wherever possible (Br. 11-13); (2) that the present controversy be-

tween Kentucky and Ohio has never been authoritatively decided (Br. 13-17); and (3) that the evidence to support the conclusion that the true boundary line between the two States lies in the middle of the Ohio River is overwhelming (Br. 17-20).[4] Kentucky filed an opposition to the motion, contending that, even if the facts newly alleged by Ohio were true, the boundary between the two States had been settled by this Court's decisions in *Handly's Lessee* v. *Anthony*, *supra*, and *Indiana* v. *Kentucky*, 136 U.S. 479 (1890), and that Ohio courts had recognized the authority of those cases. On November 9, 1971, this Court entered an order referring the motion to the Special Master. 404 U.S. 933.

On December 14, 1971, there was a hearing before the Special Master. Counsel conceded that Kentucky was not challenging the sufficiency or the truth of the allegations of the amended complaint (Tr. 4, 10, 33, 57).[5] He also

> • • • intimated that if permitted, the proposed amendment would necessitate the filing of a counterclaim for heavy expenditures made since 1792 north of the mid-point of the River. (Rep. 3; Tr. 12-13, 36-37.)

The Report of the Special Master recommends that an order be entered denying the petition for leave to amend the complaint (Rep. 16). The Report points out that *Handly's Lessee* v. *Anthony*, *supra*, was decided over 150 years

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[4] In the alternative the proposed amended complaint reiterates, with some amplification and clarification, the allegations of the original complaint to the effect that the boundary should, at least, be drawn at the low water mark on the northerly shore as it existed in 1792 (A.C. 6-7).

[5] References to the transcript of the hearing will be given as "Tr".

ago (Rep. 4-6); that Kentucky has always recognized that case as determinative of her boundary with Ohio (Rep. 6-7, 15); that *Handly* has been repeatedly followed in other decisions in this Court (Rep. 7-8); that various Ohio decisions seem to accept it (Rep. 8-11); and that this Court has said that long acquiescence by one state, in the exercise of dominion over territory by another, is conclusive of the latter's title (Rep. 12-15). In essence, the Report concludes that Ohio courts have, for many years, accepted the holding of *Handly* as determinative of the Kentucky-Ohio, as well as the Indiana-Kentucky, boundary line; and that in view of this long acquiescence, the proposed amendment to the complaint fails, as a matter of law, to state a cause of action (Rep. 15-16).

ARGUMENT

I. INTRODUCTION AND SUMMARY

This is the first case in which the location of the Kentucky-Ohio boundary line in the Ohio River has been squarely put in issue before any court. There are three possibilities: (1) the middle of the River; (2) the low water mark on the northerly shore as it existed in 1792; or (3) the north shore low water mark today. The second and third possibilities were raised by Ohio's original complaint and Kentucky's answer thereto. The only question now before this Court is whether Ohio shall be allowed to amend its complaint so as to raise the first of these three possible lines.

The Report of the Special Master recommends against allowance of the amendment on the basis of two conclusions (Rep. 15-16). The Report points out that the location of

the Indiana-Kentucky line has been before this Court on several occasions, and has been held to be the low water mark on the north side—without specification between the 1792 line and that of the present day (Rep. 6-8). See *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), and *Indiana* v. *Kentucky*, 136 U.S. 479 (1890). Relying on language in several cases decided by The Supreme Court of Ohio, the Report first concludes (Rep. 15) that Ohio has long acquiesced in the *Handly* decision as determinative of Kentucky's northern border line, with Ohio as well as with Indiana. The Report then concludes (Rep. 15-16) that the factual allegations of the proposed amended complaint fail, as a matter of law, to state a cause of action. In our view, the first conclusion is not supported by the cases upon which it relies. The second conclusion does not follow from the first, and it is totally without support in the record.

The confusion in the Report is the result of Kentucky's confusion of two separate and distinct defenses—the defense of failure to state a cause of action, and the affirmative defense of estoppel. Whether the factual allegations of a complaint are sufficient to state a cause of action must be determined by examination of the allegations themselves. But that is not what happened here. Kentucky did not challenge the sufficiency of the new allegations, in themselves, to state a claim for relief. Instead, going outside the new facts alleged in the proposed amended complaint, Kentucky claimed, by way of confession and avoidance, that Ohio had acquiesced in this Court's decisions as to the boundary line between Indiana and Kentucky. Kentucky was, in effect, setting up an affirmative defense of estoppel. The Report, relying essentially on the language of three cases in The Supreme Court of Ohio, accepts Kentucky's argument.

This Court has said repeatedly that, in dealing with boundary disputes between two sovereign States of the Union, its guiding principle is to reach a decision on the merits, and that technical defenses such as estoppel and laches will be entertained only with the greatest reluctance. It follows that amendments to pleadings designed to lay before the Court the full scope of the dispute on the merits, are entitled to great lenience. The Federal Rules of Civil Procedure, to which this Court looks for guidance in cases over which it has original jurisdiction, lead to the same conclusion, for Rule 15(a) provides that a request to amend a pleading "shall be freely given when justice so requires." Furthermore, Rule 8(b) and (c) and Rule 12(b), when read in conjunction, provide that all affirmative defenses must be presented by a responsive pleading. An affirmative defense may not be raised by way of a motion to dismiss the complaint for failure to state a cause of action.

What happened here is that Ohio asked leave to amend the original complaint in order to allege facts underlying a new theory in support of the claim for relief. Ohio alleged historical facts and documents which lead to the conclusion that Virginia had no title to any of the territory north and west of the Ohio River, when, in 1784, she ceded to the United States all her "right, title, and claim" to such territory. Ohio pointed out that this Court's decisions in *Handly's Lessee v. Anthony*, *supra*, and *Indiana* v. *Kentucky*, *supra*, simply *assumed* that Virginia did have title to such territory in 1784; that those cases involved only the Indiana-Kentucky border line; and that there had never been an authoritative decision as to the Kentucky-Ohio line. Kentucky did not challenge the sufficiency of the new allegations to state a cause of action in themselves. In-

stead, she presented an affirmative defense based on Ohio's alleged acceptance of *Handly*, in certain decisions of its Supreme Court, as determinative of the Kentucky-Ohio line.

We respectfully submit that those cases do not support the reading given them by Kentucky. We further submit that, since the sufficiency of the allegations in the proposed amended complaint has not been challenged, leave should be granted to file the amended complaint and Kentucky should be given time to file an answer.

Although Kentucky has not seriously attempted to show that the allegations of the amended complaint are, in themselves, insufficient to state a cause of action,[6] we shall briefly outline the main evidence to support the conclusion that the boundary between Kentucky and Ohio lies in the middle of the River. We shall then set forth our reasons why the motion for leave to file the amended complaint should be granted.

II. THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT STATE A CAUSE OF ACTION.

A comparison of the original complaint with Ohio's proposed amended version will reveal that the latter contains numerous amplifications and clarifications of the matters already alleged in the former. For present purposes, however, we are concerned only with the new course of action alleged in the amended complaint. That amendment reads as follows (A.C. 4-6):

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[6] In addition to the affirmative defense of estoppel, Kentucky's brief in opposition to the motion for leave to amend suggested (pp. 3-4) that the boundary had been settled by various federal and state enactments leading up to Kentucky's admission to the Union. As we have already noted in the Statement above, the Report of the Special Master rejects this argument (Rep. 3-4).

1. The claim of the Commonwealth of Kentucky to a boundary at the low water mark on the northerly shore of the Ohio River is founded upon the fact that Kentucky was still a part of the Commonwealth of Virginia between 1774 and 1784, during the Revolutionary War and during the period when the United States were operating under the Articles of Confederation. At that time the Commonwealth of Virginia claimed title to the land on both sides of that part of the Ohio River which now flows between Kentucky and Ohio. This claim of title was violently opposed by many others of the thirteen original States, several of whom had conflicting claims of title to the same territory north of the Ohio River. The Continental Congress, fearing disintegration of the Union, refused to decide the question of title, and suggested that the individual States surrender their claims of title to the United States for the good of all. All of the claimant States eventually did so. Thus, the representatives of Virginia in the Continental Congress, on March 1, 1784, pursuant to an act of the General Assembly of the Commonwealth of Virginia, ceded to the United States, for the common good of all the States, all Virginia's 'right, title, and claim' to the land northwestward of the Ohio River. This act, known as the 'Cession of Virginia', was a compromise of Virginia's claim of title.

2. Despite its claim, the Commonwealth of Virginia actually had no title to the land north of that portion of the Ohio River which now flows between Kentucky and Ohio. Virginia's claim rested upon the terms of a charter issued by King James I to the London Company in 1609, which charter, beginning from certain specified points on the Atlantic coast, purported to grant to the Company all the continental lands 'from sea to sea, west and northwest.' It is obvious from historical records that King James had no conception of the distance between the Atlantic and the Pacific Oceans, and that he had no intention of granting such an enormous expanse of territory. Furthermore, regardless of the validity of Virginia's original claim, its extent was sharply curtailed by subsequent events. The charter of the London Company was revoked in 1624 and Virginia became a crown colony; shortly after 1650 the French moved into the middle of the continent and for almost a hundred years held control of the Mississippi and the Ohio valleys until driven out by the British during the French and Indian War; by the Treaty of Paris, which terminated that war in 1763, the French ceded to the British Crown the entire eastern Mississippi valley north of the Ohio River and west of the Allegheny Mountains; by a royal Proclamation, issued on October 10, 1763, the British Crown reserved all of that land to the Indian tribes which had assisted the British

in the war, and confined the American colonies to the eastern side of the Allegheny Mountains; by the Treaty of Fort Stanwix, concluded between the British Crown and the Indians of the Six Nations, in November, 1768, the boundary between the Indian lands and the colonies was pushed westward across the mountains to a line drawn from northwestern Pennsylvania down the Allegheny and the Ohio Rivers, but the colonists were still forbidden to go north and west of that line; and by the Quebec Act, enacted by parliament and approved by the Crown in 1774, all the territory north and west of the Ohio River was made a part of the Province of Quebec.

3. The commonwealth of Virginia did not, at the time of its so-called Cession, have title to the land on the north side of that part of the Ohio River which now flows between Kentucky and Ohio. Virginia was not, therefore, the common proprietor of both sides of the Ohio River, and its boundary ran at most, in the middle of the River. The Commonwealth of Kentucky, being successor to Virginia, is entitled to no more.

The principles of the law of boundaries between States were formulated by this Court, in reliance on international law, in *Handly's Lessee* v. *Anthony*, *supra*. That case involved the line between Indiana and Kentucky, and it arose from a dispute between two private parties over a tract of land projecting into the River from the Indiana side, the one party claiming under a grant from Kentucky,

the other, from Indiana. This Court said (5 Wheat. 379):

> When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary.

The opinion then explains that, in the latter case, the boundary of the original proprietor state extends to the low-water mark on the side of the newly-created state. 5 Wheat. 375-385.

For present purposes, the crucial point, to which we have already adverted in Section I, *supra*, is that the opinion simply *assumes* that Virginia was the original proprietor of both the south and the north sides of the Ohio River. The opinion goes no further into that question than to state (5 Wheat. 376):

> Both Kentucky and Indiana *were supposed* to be comprehended within the charter of Virginia at the commencement of the war of our revolution. (Emphasis supplied.)

We respectfully submit that the historical facts and documents, upon which the amended complaint is based, lead inevitably to the conclusion that the Court's assumption was erroneous, and that, if the principles of *Handly* had been applied to the actual facts, Virginia's boundary would

have been found to extend, at most, to the middle of the River.'

The main evidence to support the allegations of the amended complaint may briefly be summarized as follows:

The claim of the Commonwealth of Kentucky to practically the entire Ohio River, through that portion of its course which runs between Ohio and Kentucky, rests upon Virginia's ancient claim of title to the land which lies north of that section of the River (Rep. 7). Virginia's claim of title rests, in turn, essentially upon one British document—the charter granted to the London Company in 1609 by King James I, the terms of which were broad enough to include a vast tract from the Atlantic to the Pacific including what ultimately became the Northwest Territory. 1 Hening's Stat. at Large, 80, 88.[4]

It seems obvious from historical records that King James had no conception, in 1609, of the distance between the Atlantic and the Pacific Oceans, and that he had no intention of granting such an enormous expanse of territory. Chief Justice Marshall, in opinions for the Court, has

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[3] As Mr. Justice Brewer noted in *St. Joseph & G.I.R.R. Co. v. Daveruaz*, 41 Fed. 14 (1889), while he was still a district judge, the assumption in the *Handly* opinion was only a dictum which had no effect upon the actual decision of the case. Since the land in question lay above the low water mark on the Indiana side, there was no need to determine the exact location of the boundary between the two States. Regardless of whether the boundary lay in the middle of the River or at the north low water line, the land in dispute was a part of Indiana. 5 Wheat. 373-382.

Moreover, it does not appear that the Indiana party made any argument that the Indiana boundary extended to the middle of the River, or that he challenged the assumption of Virginia's title to the Northwest Territory. This was, of course, unnecessary in view of the outcome.

[4] In the controversial shell case, presently pending before this Court, Virginia does relies on the 1609 charter. *United States v. Maine, et al.*, No. 83, Original, pending before a special master on the United States' motion for judgment on the pleadings.

characterized such grants as "extravagant and absurd." *Worcester* v. *Georgia*, 6 Pet. 515, 544 (1832), and *Johnson* v. *McIntosh*, 8 Wheat. 543, 582 (1823). But, whatever may have been the validity of the original grant, other British documents show that the 1609 charter was revoked and that the western boundary of the Colony of Virginia was sharply restricted.

In 1624 the King, dissatisfied with the London Company's management of the colony, instituted a *quo warranto* proceeding which resulted in a decree revoking the charter, and Virginia became a Crown colony. 1 Marshall, *George Washington*, p. 56; 2 Hening's Stat. at Large, 525-526; 1 Laws of the United States, 465 (B. & D. ed. 1815). Thereafter, the French, moving down from Canada and up from New Orleans, took over the middle of the continent for more than a hundred years, until driven out by the British in the French and Indian War which lasted from 1756 to 1763. By the Treaty of Paris, terminating that war in 1763, the French ceded to the British Crown the entire eastern Mississippi valley north of the Ohio River and west of the Allegheny Mountains. 1 Laws of the United States, 441-442 (B. & D. ed. 1815); Shortt and Doughty, Documents Relating to The Constitutional History of Canada, 1759-1791, p. 86. No part of that territory north of the Ohio River was ever thereafter attached by the Crown to the Colony of Virginia.[9] On the contrary, a few months after the Treaty of Paris, the Crown issued the Proclamation of October 10, 1763, by which all the land west of the crest of the Allegheny Mountains was reserved for the Indian tribes who had assisted the British during the war,

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[9] The King had, of course, authority to fix the boundaries of Royal Provinces. *Vermont* v. *New Hampshire*, 289 U.S. 593, 600 (1932); *Johnson* v. *McIntosh*, 8 Wheat. 543, 580 (1823).

and the American colonies were specifically confined to the eastern slopes of the mountains. 7 Hening's Stat. at Large, 662, 666-668; 1 American Archives, Fourth Series, 172-176; 1 Laws of the United States, 443-448 (R. & D. ed. 1815); Illinois Historical Collections, Vol. X, *The Critical Period*, 1763-1765, pp. 39, 43-44. This caused great discontent among the colonists, and, as a result, the Crown, in November 1768, entered into the Treaty of Fort Stanwix with the Indians of the Six Nations, by the terms of which treaty the boundary between the Indian lands and the colonies was pushed westward across the mountains to a line running from northwestern Pennsylvania down the Allegheny and the Ohio Rivers. Again, the colonists were prohibited from crossing to the north and west of that line. The treaty was signed in the presence of a representative of Virginia. VIII Documents Relative to the Colonial History of the State of New York, pp. 135-137. Finally, in 1774, the Quebec Act, enacted by Parliament and approved by the Crown, annexed all the territory north and west of the Ohio River to the Province of Quebec. 1 American Archives, Fourth Series, 216-220, 914.

This brief outline indicates quite clearly that Virginia's western boundary, whatever may have been its original westward extent, had been sharply curtailed prior to the War of the Revolution. Indeed, it might be argued that Virginia's boundary lay at the low water mark on the *east* and *south* sides of the Ohio River, since the map which accompanies the text of the Treaty of Fort Stanwix in the citation just given shows the line drawn by that royal treaty running along the east and south bank of the River."

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[10] See also references to the same line on the south bank in later treaties between the United States and the Chickasaw Nation in 1786 and 1805. 1 Laws of the United States 583, 584 (R. & D. ed. 1815).

However, we think that the United States, which, upon the signing of the Declaration of Independence, succeeded to the rights of the British Crown in the territories north and west of the River, clearly intended the middle of the River to be the boundary between the old and the new states. Article 5 of the Ordinance of July 13, 1787, providing for the government of the territories northwest of the River, simply directed that the first three new states to be formed therein be bounded by the Ohio River,"[11] and Article 4 provided in pertinent part:"

> "***[t]he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, import, or duty therefor.

The early laws of the United States speak repeatedly of Virginia, Kentucky and Tennessee as the lands south, or south and east, of the River, and of Ohio, Indiana and Illinois as the lands to the north, or the north and west.[12] In fact, in setting the boundaries of internal revenue districts in 1799, Congress provided for the creation of a district in Kentucky which should include all "the shores and waters on the *south side* of the River Ohio" from the Mississippi to the Cumberland, while the District of Ohio

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[11] 1 Laws of the United States 475, 480 (B. & D. ed. 1815).

[12] Ibid., 479-480.

[13] See, e.g., Laws of the United States, *supra*, Vol. 2, pp. 14, 104, 138, 179, 311, 421, 451, 533; Vol. 3, pp. 367, 385, 396, 596, 612.

should include "all the waters, shores, and inlets, of the river Ohio, on the *northern side* ***." 3 Laws of the United States 140, 151 (Emphasis supplied). It is most improbable that Congress would have set such boundaries for its own revenue districts unless it was satisfied that Kentucky's northern boundary went only to the middle of the River.[11]

Finally, it should be noted that Virginia's leaders were well aware of the flimsiness of her claim of title to lands north and west of the River. George Washington, writing to his agent, prior to the Revolution, about his own personal interest in lands beyond the Ohio River, clearly realized that he could not obtain a valid title thereto until the Royal Proclamation of October 1763 had been altered. The Washington-Crawford Letters, C.W. Butterfield, ed., pp. 1-5. And Madison, representing Virginia in the Continental Congress during the debate on the title claims of various states to the western lands, to which we shall refer in Section II (B) below, wrote to Jefferson, at that time Governor of the State, urgently requesting that documentary proof of Virginia's title be forwarded to him. 1 Papers of James Madison, H.D. Gilpin, ed., pp. 106-109, 119-124. Jefferson was unable to comply. Hinsdale, The Old Northwest, pp. 231-235.

In view of the foregoing, we respectfully submit that the allegations of the amended complaint were sufficient, as a matter of law, to state Ohio's claim to a boundary in the middle of the River. In *Cooley* v. *Gibson*, 355 U.S. 41 (1957), this Court said (at pp. 45-46):

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[11] We assume, from the course of this Court's decisions, that the middle of a river is the thalweg, or main channel of navigation. *Iowa* v. *Illinois*, 147 U.S. 1, 4-14 (1893); *Arkansas* v. *Mississippi*, 250 U.S. 39, 45 (1919); *New Jersey* v. *Delaware*, 291 U.S. 361 (1933); cf. *Arkansas* v. *Tennessee*, 397 U.S. 88 (1969), supplemented 398 U.S. 219 (1969). This is not a case like *Texas* v. *Louisiana*, No. 36, Original, pending on motion for judgment, in which the boundary between the two States was specifically described as "the middle" of the stream.

> ***[i]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.***

See also 5 Wright & Miller, Federal Practice and Procedure (1969 ed.) SS 1215, 1216, 1357.

III. THE MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT SHOULD BE GRANTED.

In the previous Section we have endeavored to show that the allegations of the proposed amended complaint clearly state a cause of action. We did so because the Report of the Special Master concluded (Rep. 15-16) that the amendment failed, as a matter of law, to state a claim. As noted in the Introduction and Summary above, this was a result of Kentucky's confusion of two distinct defenses—failure to state a claim and estoppel. What the Report really does is to accept Kentucky's suggestion that it has an affirmative defense to the amended complaint, i.e., an estoppel as a result of Ohio's long acquiescence in this Court's opinions in *Handly's Lessee* v. *Anthony* and *Indiana* v. *Kentucky*, *supra*. We respectfully submit that (A) this Court has repeatedly said that it will not accept such a technical defense in a border dispute between sovereign States, absent compelling reasons; (B) that the border dispute between Kentucky and Ohio has never been authoritatively decided; and (C) that Ohio has not acquiesced in the *Handly* and *Indiana* decisions.

A. THIS COURT WILL DECIDE A BORDER DISPUTE BETWEEN STATES ON THE MERITS WHEREVER POSSIBLE.

Boundary disputes between sovereign States of the Union are essentially political in nature. See *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 750-751 (1838), and dissent by Chief Justice Taney, at pp. 752-754; cf. also *United States* v. *Tillamooks*, 329 U.S. 40, 45-46 (1946). Article 9 of the Articles of Confederation provided that a special court be drawn in each such instance, under a detailed and cumbersome procedure. The Constitution, however, specifically commits disputes between States to this Court's jurisdiction. Article III, Section 2, Clause 2.

Because of the delicate nature of such cases, this Court has consistently held that they are to be handled "with a view to public convenience and the avoidance of controversy." *Vermont* v. *New Hampshire*, 289 U.S. 593, 606 (1933), quoting *Handly's Lessee* v. *Anthony*, supra, 5 Wheat. at 383. The proceeding is equitable in nature, according to *Rhode Island* v. *Massachusetts*, 14 Pet. 210 (1840), but (p. 257),

> "it will be the duty of the court to mould the rules of chancery practice and pleading in such a manner as to bring this case to a *final hearing* on its *real merits*. It is too important in its character, and the interests concerned are too great to be decided upon the mere technicalities of chancery pleading." [A]nd in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength.
>
> (Emphasis supplied.)

In *Virginia* v. *West Virginia*, 220 U.S. 1 (1910), this Court said (at p. 27):

> The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislatures of either state alone.*** Therefore we shall spend no time on objections as to multifariousness, laches, and the like, except so far as they affect the merits, with which we proceed to deal.***

In a later proceeding in the same case, West Virginia, over the objection of Virginia, sought leave to file a supplemental answer. *Virginia* v. *West Virginia*, 234 U.S. 117 (1913). This Court conceded that, under the circumstances of West Virginia's motion, the ordinary rules of procedure would render it impossible to grant the request, had it been made in a case between ordinary litigants. However, since the disputants were sovereign States, the Court said (234 U.S. at 121):

> We are of the opinion, however, that such concession ought not to be here controlling. As we have pointed out, in acting in this case from first to last the fact that the suit was not an ordinary one concerning a difference between individuals, but was a controversy between states, involving grave questions of public law, determinable by this court under the exceptional grant of power conferred upon it by the Constitution, has been the

guide by which every step and every conclusion hitherto expressed has been controlled. And we are of the opinion that this guiding principle should not now be lost sight of, to the end that when the case comes ultimately to be finally and irrevocably disposed of, as come ultimately it must, in the absence of agreement between the parties, there may be no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, so that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. This conclusion, which we think is required by the duty owed to the moving State, also in our opinion operates no injustice to the opposing state, since it but affords an additional opportunity to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy.

See also similar rulings in the same case at 222 U.S. 17 (1911) and 231 U.S. 89 (1913).

In the present case, the Commonwealth of Kentucky has suggested that she has a defense of estoppel to the amended complaint which the State of Ohio now seeks leave to file. An estoppel against a sovereign State is, of course, a defense which is technical in the extreme, and which will never be entertained except under the most extraordinary of circumstances.

Furthermore, the defense of estoppel is an affirmative

defense which must be raised by a responsive pleading." Here, there has been no responsive pleading to the amended complaint since Ohio has not yet been allowed to file it.

Finally, as we shall show in subsection (C), *infra*, the cases in which Ohio purportedly acquiesced in the holding of *Handly* and *Indiana* do not support that proposition.

We respectfully submit, therefore, that the above cited decisions of this Court require that Ohio be permitted, at the least, to file its amended complaint and that Kentucky be given time to plead in response thereto."

It may be, of course, that the facts, if ultimately allowed in evidence, will convince the Court that so many rights of Kentucky citizens have become fixed, in the territory in question, as to render a decision in Ohio's favor disruptive of the public convenience. That is what happened in the cases upon which the Report of the Special Master relies (Rep. 12-15). *Indiana* v. *Kentucky*, *supra*; *Michigan* v. *Wisconsin*, 270 U.S. 295 (1926); *Vermont* v. *New Hampshire*, 289 U.S. 593 (1933); *Maryland* v. *West Virginia*, 217 U.S. 1 (1910); *Louisiana* v. *Mississippi*, 202 U.S. 1 (1906); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893); *Rhode Island* v. *Massachusetts*, 4 How. 591 (1846). But in none of those cases did the Court dispose of the question on the pleadings alone. There were lengthy evidentiary hearings and voluminous records, and the Court was persuaded by the

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[15] See Rule 8(b) and (c) and Rule 12(b), Federal Rules of Civil Procedure; 5 Wright and Miller, Federal Practice and Procedure §§ 1270, 1271. Although the Federal Rules of Civil Procedure are not controlling, this Court looks to them for guidance in cases over which it has original jurisdiction. Rule 9 (2) of this Court's Rules; *Utah* v. *United States*, 394 U.S. 89, 95 (1968).

[16] See also Rule 15(a), Federal Rules of Civil Procedure, which provides that a request to amend a pleading "shall be freely given when justice so requires." See 6 Wright & Miller, Federal Practice and Procedure, § 1484.

evidence that the rights of individual citizens in disputed land had become fixed over many years." Here, we are concerned with a river, and, as we understand it, there are only three small islands in the whole course of that River between Kentucky and Ohio. Furthermore, there is no evidence. There is no record. There are not even pleadings to bring to issue before the Court Ohio's claim to a boundary in the middle of the River."

B. THE BOUNDARY DISPUTE BETWEEN KENTUCKY AND OHIO HAS NEVER BEEN AUTHORITATIVELY DECIDED.

The location of the boundary line between the territories which now constitute the Commonwealth of Kentucky and the State of Ohio is a question, (1) which the Continental Congress avoided by working out a compromise between many states with conflicting claims; (2) which the Constitutional Congress avoided in vague statutory language; and (3) which this Court has never previously been asked to answer.

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[17] See, however, U.S. v. Texas, 162 U.S. 1 (1895), in that case, an inaccurate map led Texas to claim, for many years, that its boundary with the Indian Territory (Oklahoma) was many miles west of its proper location, and language in an Act of Congress indicated acceptance of the erroneous boundary. However, in answer to the argument that the rights of Texas citizens had become fixed in the disputed territory, this Court held (162 U.S. at p. 39):

> "But whatever may be the facts bearing on this point, our duty is to determine the present issues according to the settled principles of law, without reference to considerations of inconvenience to individuals residing in the disputed territory.
>
> (Emphasis supplied.)

[18] And there is, of course, nothing to back up Kentucky's "intimation" of a prescription (see Statement, supra), which seems to have been given some weight in the recommendation of the Report that leave to amend the complaint be denied (Rep. 4, 14).

1. Shortly after the Declaration of Independence the permanence of the confederacy of the thirteen original States was seriously threatened by a dispute in the Continental Congress concerning the title to, and the disposition of, the lands north and west of the Ohio River which ultimately became the Northwest Territories. Virginia, New York, Massachusetts and Connecticut, relying upon original charter grants from the British Crown, presented to Congress conflicting claims of title either to the whole, or to parts, of these vacant western lands. Other States, whose western boundaries had been definitely fixed in their charters, notably Pennsylvania and Maryland, argued that title to the western lands lay in the Crown, and that it had devolved upon the United States at the signing of the Declaration of Independence. Maryland flatly refused to sign the Articles of Confederation until some satisfactory disposition should be made of the question. On November 3, 1781, a committee, appointed by Congress to study the various claims, submitted a report denying the validity of Virginia's claim and affirming the claim of New York. This report came before Congress for consideration on May 1, 1782, but no action was ever taken on it. Instead, Congress, fearful that the dispute would dissolve the confederacy of the States, refused to decide the issue of title, and urged all the States who had claims to the vacant lands to accept a compromise by ceding their claims to the United States for the common good. All, including Virginia, did so, leaving the question of Virginia's title, and, coincidentally, of its boundary in the Ohio River, undecided.[19] We have already

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[19] H.B. Adams, Maryland's Influence on Land Cessions to the United States, Johns Hopkins University Studies in History and Political Science, Third Series, Vol. III, pp. 7-54; Jensen, The Cession of the Old Northwest, 23 Mississippi Valley Historical Review, pp. 27-48; Jensen, Creation of the National Domain, 26 Mississippi Valley Historical Review, pp. 323-342; Hinsdale, The Old Northwest, pp. 206-254.

noted, in the previous Section of this brief, that the Continental Congress, in providing for the government of the Northwest Territories by the Ordinance of 1787, simply described them as bounded by the Ohio River. 1 Laws of the United States 475, *supra*.

2. We have also pointed out in the previous Section, that, after the adoption of the Constitution in 1787, the early enactments of Congress avoided any mention of boundaries to the Ohio River, and spoke only of the lands north and west, as opposed to the lands south and east, of the River. See footnote 13, *supra*. Up to this point we are in accord with the conclusions of the Report of the Special Master (Rep. 3-4).

3. The Report concludes (Rep. 11-12), however, that the Kentucky-Ohio boundary has been settled by a series of cases in this Court, beginning with *Handly's Lessee* v. *Anthony*, *supra*, and followed by *Indiana* v. *Kentucky*, *supra*; *Henderson Bridge Co.* v. *Henderson*, 173 U.S. 592 (1899); and *Wedding* v. *Meyler*, 192 U.S. 573 (1904).[*]

But all of these cases involved the boundary line between Kentucky and Indiana. Ohio, not being a party to any of them, is of course not bound by what they decided.

Furthermore, the middle of the River issue which Ohio now seeks to raise, was never properly before this Court in any of the Indiana-Kentucky cases. It has already been noted in the previous Section, that the *Handly* case was a contest between two private parties; that this Court's conclusion, that the Indiana-Kentucky border lay at the low water line on the north, was based on an assumption of Virginia's ancient title to the northern shore; and that the Indiana party made no effort to challenge this assump-

[*] This was the position taken in our original complaint.

tion, which was irrelevant to the outcome in any event. An examination of this Court's record in *Indiana* v. *Kentucky* (No. 2, Original, 1889 Term) shows that, when the evidence was heard by commissioners appointed by the Court, the only issue appeared to be whether the tract in question lay above, or below, the low water line on the Indiana shore. Upon argument before this Court, however, Indiana urged, without having laid any foundation in the record, that her boundary extended to the middle of the River. 136 U.S. at pp. 486-493. The Court brushed the contention aside by reference to its decision in *Handly*, 136 U.S. at pp. 505-508, and made the same assumption that Kentucky's territory extended to the low water mark on the north because she had "succeeded to the ancient right and possession of Virginia,***." 136 U.S. at p. 508. These two decisions were followed without discussion or reexamination in the *Henderson Bridge* and *Meyler* cases.

Finally, the principles underlying Virginia's claim of title, simply assumed in *Handly* in 1820 and accepted without question in the three later cases, had been carefully examined in depth by this Court in 1832 with quite different results. *Worcester* v. *Georgia*, *supra*. The opinions in both *Handly* and *Worcester* were written by Chief Justice Marshall.

In *Handly* there was, of course, no inquiry into the nature of Virginia's title. No challenge was raised, and a reference to the charter was considered sufficient. 5 Wheat. at pp. 376-377. We have seen, however, that Virginia's 1609 charter had been revoked; that her western boundaries had been sharply curtailed by the Proclamation of 1763, the Treaty of Fort Stanwix, and the Quebec Act; and that the British Crown had reserved the lands north and west of the River for the Indian Nations.

In *Worcester*, the State of Georgia sought to enforce

its laws within an Indian reservation, established by treaty with the United States, which clearly lay within Georgia's chartered limits. Chief Justice Marshall's opinion holds that title to the lands in question lay, not in the State of Georgia, but in the Cherokee Nation; and that Georgia's effort to enforce her laws within the Cherokee boundaries was unconstitutional. The opinion holds that the charter granted by the British Crown conveyed no title to the lands described therein, but a mere privilege of pre-emption. 6 Pet. at p. 544.

Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects who associated for the purpose of carrying the views of the crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did

not affect to claim; nor was it so understood. (6 Pet. at pp. 544-545.)

If Georgia had no title to land which lay *within* her chartered bounds but had been reserved for the Cherokee Nation, then clearly Virginia had no title to the territories north and west of the Ohio River which lay *outside* her limited boundaries. In the light of the foregoing, *Handly* and its progeny cannot be considered authoritative decisions as to the location of the Kentucky-Ohio boundary.[21]

C. OHIO HAS NOT ACQUIESCED IN THIS COURT'S DECISIONS ON THE INDIANA-KENTUCKY BOUNDARY.

As has been noted in the Statement above, the Special Master's recommendation against allowance of leave to amend rests essentially on three old cases in The Supreme Court of Ohio (Rep. 9-12). These are *Lessee of McCullock* v. *Aten*, 2 Ohio Rep. 307 (1825); *Lessee of Blanchard* v. *Porter*, 11 Ohio Rep. 138 (1841); and *Booth* v. *Hubbard's Adm'r.*, 8 Ohio St. 244 (1858). We respectfully submit that they do not support the recommendation.

The first, *McCullock* v. *Aten*, did not involve the Ohio River. McCullock and Aten owned adjacent tracts, their respective titles being derived from the same grantor. The deeds described the common boundary as "down the creek with the several meanders thereof." It was clear that the creek itself had been granted to Aten, and the question was, what was the extent of the creek? Aten argued that

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[21] For the gradual change, from *Handly* to *Worcester*, in Chief Justice Marshall's views of the relationship between charters and Indian titles, see also *Johnson* v. *McIntosh*, 8 Wheat. 587 (1823); *Cherokee* v. *The State of Georgia*, 5 Pet. 15 (1831); Haines, *The Role of the Supreme Court in Government and Politics 1789-1835*, pp. 524, 596-606.

it extended to the top of the bank on McCulloch's side. The latter, in turn, contended that the stream reached only to the low water mark. This was exactly the situation in *Handly's Lessee v. Anthony*, supra, in which the Kentucky party argued for the top of the bank, and the Indiana party, for the low water mark. In explaining the basis of its decision for McCulloch, the Ohio Supreme Court said (2 Ohio Rep. at p. 310):

> "The state is bounded by the Ohio river: but it can scarcely be supposed that the beach, below the brink of the bank, is not within her jurisdiction. In the case of *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, this doctrine is distinctly recognized, by the Supreme Court of the United States, as a rule of boundary, and it is one to which this court has always adhered.

The case has nothing to do with the Kentucky-Ohio boundary and *Handly* is cited only as authority on the point that the beach between the low water mark and the top of the bank cannot be considered a part of the stream.

The second case, *Blanchard v. Porter*, supra, did involve a tract of land on the Ohio River bank. Again, however, two private parties were involved; and, again, the dispute arose over the beach between the low and the high water marks, the sole question being whether the owner could convey title to the beach, or whether it was part of the River in which the public had an interest because of the provision in the Ordinance of 1787 making the Ohio River a public highway. The court, in order to show what was *not* a question in the case, said (11 Ohio Rep. at p. 142):

"***Nor is it a question, whether the deed to the plaintiff conveys the land and water, to the centre of the river, since Virginia only granted the territory on the northern bank of the river, to low water mark; although, by the compact of 1792, between Virginia and Kentucky, a *concurrent jurisdiction* over the river is accorded to Ohio and Kentucky,***. (Emphasis in original.)

Again, this case has nothing to do with the Kentucky-Ohio boundary and is concerned only with what can be said to be the extent of a stream upon its margins.

The third case, *Booth* v. *Hubbard's Adm'r.*, *supra*, was a suit for damages arising out of a drowning in the Ohio River, which concededly had occurred above the low water mark on the Ohio side. Once again, the real dispute was over the marginal extent of the River. Did it extend to the top of the bank on the Ohio side, or only to the low water mark? The defendant wanted the jury instructed that they should return a verdict in his favor if they found that the accident had happened on the Virginia (now West Virginia) side of the top of the bank on the Ohio shore. The plaintiff, however, prevailed and the trial court told the jury that they should find for the plaintiff if the drowning took place inside the low water mark on the Ohio side. In view of the concession that the deceased was drowned inside the low water mark, the Ohio Supreme Court held that the defendant was not prejudiced by the giving of the plaintiff's instruction. The Ohio boundary, the court said, extended into the River at least to the low water mark. But, the court added (8 Ohio St. at pp. 245-246),

> It does not become necessary, in this case, to determine whether the middle of the Ohio River, 'the ordinary medium stream', does or does not constitute the boundary line between the states of Virginia and Ohio. For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784.***

The opinion goes on to note that this Court had itself made a similar assumption in *Handly*. We fail to see how this case can be said to show Ohio's acquiescence in the *Handly* assumption since the opinion specifically finds it unnecessary to reach that question.

All of these three cases upon which the Report relies were disputes between private parties. The State of Ohio was not involved in any of them, and the most that can be said is that two of them decide that Ohio's southern boundary in the Ohio River extends, *at least*, to the low water mark on the Ohio shore. The middle of the River issue which Ohio now seeks to raise by the proposed amended complaint was not an issue in any of them, and it has never before been litigated by the Commonwealth of Kentucky and the State of Ohio. In view of the fact that boundary disputes between states will be decided on the merits whenever possible, and in view of the erroneous foundation of *Handly* and the other Indiana-Kentucky cases, we respectfully submit that the three cases on which the Report relies provide no proper basis for a denial of Ohio's motion for leave to file the amended complaint.

Furthermore, there are other cases which indicate that Ohio has never acquiesced in *Handly*. The Report itself

refers (Rep. 10-11) to two later cases in The Supreme Court of Ohio in which the middle of the River issue, though argued by the parties, was not reached by the court because unnecessary to the decision. *Sebastian* v. *Covington & Cincinnati Bridge Co.*, 21 Ohio St. 451, 452, 456 (1871); *Covington & Cincinnati Bridge Co.* v. *Mayer*, 31 Ohio St. 317, 326-329 (1877). And in *Indiana* v. *Kentucky*, *supra*, the brief for the State of Indiana, filed in 1889, pointed out that the State of Ohio claimed that its boundary line with Kentucky lay in the middle of the Ohio River, and that Ohio regarded Chief Justice Marshall's language on that aspect of the *Handly* case as *dicta*. 136 U.S. at p. 490; and see the brief in this Court's records, pp. 15-25.

Ohio's position has been most thoroughly presented in an extraordinary argument presented to the General Court of Virginia in *Commonwealth* v. *Garner*, 44 Va. 655 (1846), by one of the greatest of Ohio's early lawyers, Samuel F. Vinton. In the *Garner* case citizens of Ohio had been indicted by Virginia for aiding slaves to escape across the Ohio River. Mr. Vinton, who had been asked by the Governor of Ohio to represent the defendants, contended that the boundary lay in the middle of the River, and that the alleged criminal acts had taken place in Ohio territory. The Virginia court held that, under this Court's decision in *Handly*, the boundary lay at the low water mark on the Ohio side; but, since the jury had found that the alleged acts occurred *above* the low water mark, the court held that they took place in Ohio, rather than in Virginia, and the indictment was dismissed. Ohio, of course, had nothing from which to appeal.

Mr. Vinton's lengthy argument has been reprinted several times, most recently in 4 Ohio Archeological and Historical Publications 64-126. The various opinions of the

Virginia Judges in the *Garner* case cover over 120 pages of the reporter's volume (44 Va. 655-780), but they do not give a true picture of Mr. Vinton's argument. It is interesting to note that the Commonwealth of Virginia was also dissatisfied with Chief Justice Marshall's opinion in *Handly*. Virginia argued that its boundary ran to the top of the bank on the Ohio side.

CONCLUSION

For the reasons stated it is respectfully submitted that the motion for leave to file an amended complaint should be granted, and that the Commonwealth of Kentucky should be given time to file an answer.

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AUGUST 1972.

CERTIFICATE OF SERVICE

I, Joseph M. Howard, Executive Assistant to The Attorney General of The State of Ohio, a member in good standing of the Bar of The Supreme Court of the United States, hereby certify that on the 14th day of August, 1972, I served copies of the foregoing Exceptions of the State of Ohio and Brief in Support of Exceptions, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
Executive Assistant
to the Attorney General
of The State of Ohio

Supreme Court, U. S.
FILED
OCT 12 1972
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27 Original

STATE OF OHIO ..... PLAINTIFF

V.

STATE OF KENTUCKY ..... DEFENDANT

REPLY OF THE STATE OF KENTUCKY TO EXCEPTIONS OF THE STATE OF OHIO TO THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972

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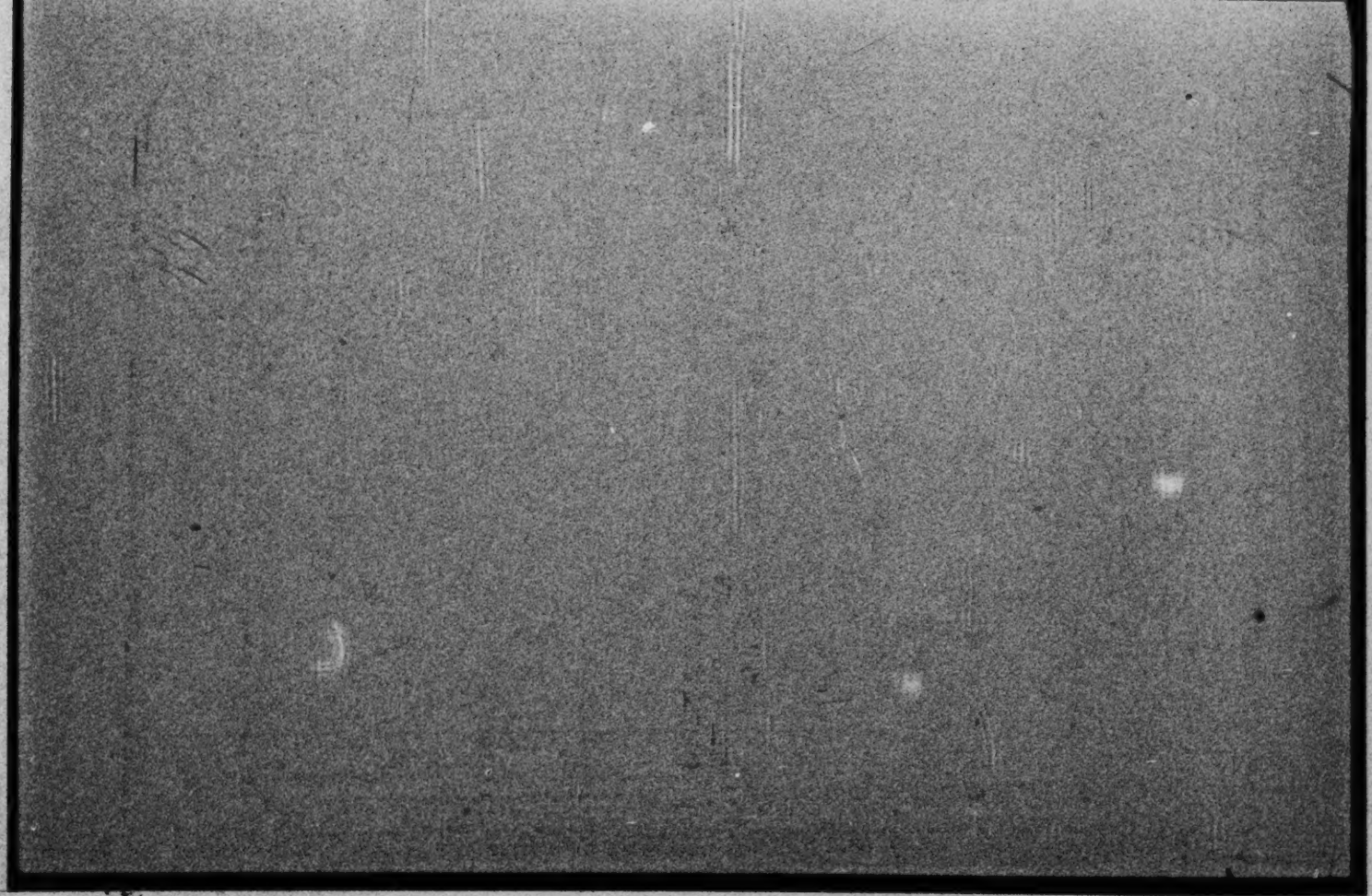

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 27, Original

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ARGUMENT

I. THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972 CORRECTLY HELD THAT THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT FAILED AS A MATTER OF LAW TO STATE A CAUSE OF ACTION.

IIa. THE PETITION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED WHERE THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDMENT, CONSIDERED UNDER THE MOST LIBERAL PRINCIPLES OF PRACTICE AND PLEADING, ARE LEGALLY BASELESS AND FAIL TO STATE A CAUSE OF ACTION.

IIb. THIS COURT HAS AUTHORITATIVELY DECIDED THAT THE BOUNDARY OF KENTUCKY WITH THE STATES BORDERING IT ON THE OHIO RIVER EXTENDS TO THE LOW WATER MARK ON THE NORTHERN SHORE OF THAT RIVER.

IIc. OHIO HAS ACQUIESCED IN THIS COURT'S DECISIONS RECOGNIZING THE LOW WATER MARK ON THE NORTHERN SHORE OF THE OHIO RIVER AS THE NORTHERN BOUNDARY LINE OF KENTUCKY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 27, Original

STATE OF OHIO ..... *Plaintiff*

v.

STATE OF KENTUCKY ..... *Defendant*

QUESTIONS PRESENTED

I. WHETHER THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972 CORRECTLY HELD THAT THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT FAILED AS A MATTER OF LAW TO STATE A CAUSE OF ACTION.

IIa. WHETHER THE PETITION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE DENIED WHERE THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDMENT, CONSIDERED UNDER THE MOST LIBERAL PRINCIPLES OF PRACTICE AND PLEADING, ARE LEGALLY BASELESS AND FAIL TO STATE A CAUSE OF ACTION.

IIb. WHETHER THIS COURT HAS AUTHORITATIVELY DECIDED THAT THE BOUNDARY OF KENTUCKY WITH THE STATES BORDERING IT ON THE OHIO RIVER EXTENDS TO THE LOW WATER MARK ON THE NORTHERN SHORE OF THAT RIVER.

IIc. WHETHER OHIO HAS ACQUIESCED IN THIS COURT'S DECISIONS RECOGNIZING THE LOW WATER MARK ON THE NORTHERN SHORE OF THE OHIO RIVER AS THE NORTHERN BOUNDARY LINE OF KENTUCKY.

This original action was initiated in 1980 when the State of Ohio filed its complaint in which it requested a declaration as to the location of the low-water mark on the northern shore of the Ohio River between Kentucky and Ohio.

In that complaint Ohio claimed that it "does now, and has always claimed and maintained that the boundary between it and the State of Kentucky is the northerly low-water mark of the Ohio River, as that mark existed in the year 1792 when Kentucky became a state . . ." (Ohio's original Complaint, hereafter referred to as "C. ").

In support of this claim, Ohio stated that this Court had judicially determined in the cases of *Handly's Lessee v. Anthony*, 18 U. S. 374 (1820); and *Indiana v. Kentucky*, 136 U. S. 479 (1890), that the boundary between the two states was the low water mark on the northern shore of the Ohio River.

Ohio further contended in its complaint that, "the determination of the boundary between Indiana and Kentucky "as the northerly low-water mark of the Ohio River, as that mark existed in 1792, should control in this dispute between Ohio and Kentucky because of the identical title relationship of the parties hereto" (C. 12).

On January, 1981, Ohio moved the Court for leave to file an amended complaint, stating in addition its contention that the low-water mark on the southern shore is the boundary between the two states as had been judicially determined by this Court in *Handly* and *Indiana v. Kentucky*.

In its amended complaint, Ohio seeks to establish the middle of the Ohio River as the boundary between the two states. To support this completely new claim, Ohio sets out matters allegedly occurring prior to the Revolutionary War.

On November 2, 1981, this Court entered an order referring the motion to the Special Master.

On April 10, 1972, the Special Master submitted his Report to this Court. The Report recommends that an order be entered denying the motion to amend the complaint of the State of Ohio (The Report of the Special Master, hereafter referred to as "Rep", 16).

In explaining on the basis for his recommendation, the Special Master stated:

> "In light of the decisions of the Supreme Court and those of the Ohio Supreme Court recognizing and accepting the northern boundary of Kentucky at the low water mark on the northern shore of the River, and on the basis of Kentucky's open and continuous assertion and exercise of dominion to that point without formal objection by Ohio for more than 150 years, it is my opinion that the pronouncement of the Court in *Indiana v. Kentucky* applies equally to Ohio, and it has for all practical purposes acquiesced in Kentucky's claim of sovereignty over the River to the low water mark on the northern shore." (Rep. 15)

The Special Master concluded that the proposed amendment, "*in any view of its factual allegation*, fails as a matter of law to state a cause of action." (Rep. 16) (Emphasis added.)

ARGUMENT

I.

THE REPORT OF THE SPECIAL MASTER FILED MAY 15, 1972 CORRECTLY HELD THAT THE FACTUAL ALLEGATIONS OF THE PROPOSED AMENDED COMPLAINT FAILED AS A MATTER OF LAW TO STATE A CAUSE OF ACTION.

The State of Ohio takes exception to the Report of the Special Master which concluded that the factual allegations of the proposed amended complaint failed, as a matter of law, to state a cause of action (Exceptions p. 1). Ohio bases its except-

...ing upon valid considerations. The first is that the State of Kentucky has also raised an attack upon the sufficiency of the allegations in the complaint, but chooses to assert a technical defense only as opposed. The second basis relied upon by Ohio is that the factual allegations clearly state a cause of action due to a series of events which allegedly affected Virginia's title to the territory south and west of the Ohio River.

These contentions are ably argued and will be discussed in the order as presented herein.

We submit that the State of Kentucky did in fact raise an attack upon the sufficiency of the allegations as shown by its brief in opposition to the motion before the Court, wherein it succinctly stated:

"Kentucky candidly recognizes the proposition made in the original complaint that the north shore has always been the boundary between the states was settled by a series of cases in this Court (Brief in support of complaint, page 14), but has now to submit, through its pleadings, that the Ohio River is not the boundary but on the middle of the river (Id. pp. 17). Kentucky submits that this contention is legally baseless."

Moreover, Kentucky has not asserted a *technical defense* as Ohio claims rather she has relied upon an acquiescence of over 150 years by the State of Ohio to the boundary of Kentucky as established at the low water mark on the northern shore. In *Michigan v. Wisconsin*, 270 U. S. 295 (1926), cited by the Special Master at page 15 of his report, the Court stated:

"The rule, long applied and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of jurisdiction over it is conclusive of the

Furthermore, there is authority for the proposition that all affirmative defenses can be presented by a motion, such as

a motion to dismiss. The United States Court of Appeals for the Third Circuit has so held in the case of *Williams v. Murdock*, 330 F.2d 745 (3rd Cir. 1964), although this is only persuasive authority for this Court.

In addition to the above, the Special Master concluded after an examination of the allegations themselves that they failed as a matter of law to state a cause of action. Such a conclusion is, in and of itself, dispositive of Ohio's assertion that Kentucky has not challenged the sufficiency of the new allegations to state a cause of action.

Ohio also claims that a cause of action was clearly established due to a series of events which affected the State of Virginia's title to the territory north and west of the Ohio River. To argue "who held what" or "who did what" prior to the American Revolution adds nothing to the matter at hand, but only confuses the issues facing this Court. As was stated in our brief in opposition to Ohio's motion for leave to file an amended complaint at p. 3:

> "Ohio now argues that certain alleged treatments of subject territory by the British Crown and others prior to the American Revolution indicate that the territory was not a part of Virginia and that the reasoning of the Supreme Court cases referred to above is therefore unsound. However, assuming for the sake of argument that it could be contended that the subject territory was not a part of Virginia prior to the American Revolution, that would not detract from the reasoning of the decisions referred to above. After the American Revolution, all of the territory involved in this controversy was a part of the whole territory of the sovereign United States of America. It was pursuant to congressional action of the sovereign United States of America and the action of the Commonwealth of Virginia included within it that the subject territory was ceded to the United States Government and subsequently became in part the State of Ohio. The State of Ohio was created by law of the sovereign United States of America. The

[redacted]

dispute between Kentucky and Ohio. Accordingly, the Special Master was correct when he recommended that an order be entered denying the petition to amend the complaint of the State of Ohio (Rep. 6). See Argument I of our reply, pp. 5-6.

II.

THIS COURT HAS AUTHORITATIVELY DECIDED THAT THE BOUNDARY OF KENTUCKY WITH THE STATES BORDERING IT ON THE OHIO RIVER EXTENDS TO THE LOW WATER MARK ON THE NORTHERN SHORE OF THAT RIVER.

Ohio, in its proposed amended complaint, contends that this Court has never been asked to determine the location of the boundary line between Kentucky and Ohio.

While it is true that this Court has never specifically considered a boundary dispute between Ohio and Kentucky, we submit that the northern boundary of Kentucky on the Ohio River has been judicially determined by this Court in *Handly's Lessee* v. *Anthony*, 18 U. S. 374 (1820), and that such determination was intended to establish not only the border line between Kentucky and Indiana on the Ohio River but also the borderlines of Ohio and Illinois, states similarly situated.

Ohio in its original complaint correctly stated that the determination of the boundary between Indiana and Kentucky "as the northerly low water mark of the Ohio River as that mark existed in 1792 should control in this dispute between Ohio and Kentucky because of the historical title relationship of the parties hereto." (C 12) (Emphasis added.)

The Special Master accurately answered this contention when he stated at pages 11 and 12 of his Report:

> "In addition, Ohio's assertion that these decisions were intended to locate the northern boundary of Kentucky on the Ohio River only as between Indiana

This judicial significance of the *Handly* decision is that the boundary along the State of Kentucky was established as extending to the low water mark on the north shore, and thus, the Court clearly and unanimously defined the entire northern boundary which encompasses the States of Illinois and Ohio. This Report correctly so held at page 12.

Even before this Court's decision in *Handly*, and ever since, Kentucky, through its legislative and judicial pronouncements, has always openly asserted dominion and control over the Ohio River to the low water mark on the northern shore. She has done so for over 150 years with no formal objection from the State of Ohio (see Rep pp. 6-8).

However, Ohio now claims that she has not acquiesced in the *Handly* decision as the Report of the Special Master so held. This argument apparently has its basis in the fact that Ohio was not a party to the decisions involving the boundary dispute and that the cases relied upon by the Special Master do not support such a proposition. (See p. 4, Brief in Opposition).

Moreover, in the words of the Special Master:

> "The acceptance by the Ohio courts of the Supreme Court's decisions in *Handly* and *Indiana v. Kentucky* setting the boundary of Kentucky at the low water mark on the northern shore undermines its contention that it is not bound by them because they involved conflicts between Indiana and Kentucky wherein Ohio was not a party. . . . At the very least, Ohio was put on notice of the practical intent and consequences of these decisions and the jeopardy they posed to its claim of dominion on the River."

Although Ohio has attempted to distinguish the three cases cited in the Report for the proposition that Ohio's highest courts have acquiesced in the boundary, she has not squarely faced the critical aspect of these cases. In no way has Ohio overcome the language of its highest court in *Lessee of McCullock v. Allen*,

CONCLUSION

For the foregoing reasons we submit that the Report of the Special Master filed May 15, 1972 was entirely correct and its recommendation, that an order be entered denying the Petition to Amend the Complaint of the State of Ohio, should be adopted by this Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 37, Original

THE STATE OF OHIO

Plaintiff,

v.

THE COMMONWEALTH OF KENTUCKY

Defendant.

MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION

On March 5, 1973, this Court entered an order denying a motion by the State of Ohio for leave to amend its original complaint.

On March 20, 1973, the Court entered an order in Texas v. *Louisiana*, No. 36, Original, which appears to be inconsistent with the order of March 5, 1973.

Wherefore, the State of Ohio, by its Attorney General, asks leave to file a motion, submitted herewith, for reconsideration of the order of March 5, 1973.

Respectfully submitted,

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WILLIAM J. BROWN
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 27, Original

THE STATE OF OHIO, Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant.

MOTION FOR RECONSIDERATION OF ORDER OF MARCH 5, 1973

Comes now the State of Ohio, by its Attorney General, and requests that the Court reconsider its order of March 5, 1973. Under that order Ohio was refused leave to amend its original complaint by the addition of allegations which, if true, lead to the conclusion that the boundary between the Commonwealth of Kentucky and the State of Ohio lies in the middle of the Ohio River. The Court's order of March 20, 1972, in *Texas* v. *Louisiana*, No. 36, Original, is, we respectfully submit, inconsistent with the order of March 5, 1973.

1. The order of March 5, 1973, denying Ohio's request for leave to amend its complaint, was based solely on the conclusion that Ohio had, for many years, acquiesced in Kentucky's claim of sovereignty over the northern half of the Ohio River. *Ohio* v. *Kentucky*, 410 U.S. 641, 642-643. The order placed reliance on a series of opinions by this Court, beginning with *Rhode Island* v. *Massachu-*

[illegible] 4 How. 391, 439 (1845), which contains language to the effect that one State may lose territorial rights [illegible] dominion over such territory by a sister State.

2. The order of March 20, 1973, decided, among other things, that a State [illegible] to land from the United States based on the acquiescence of the United States in the State's long continued exercise of jurisdiction. Texas v. Louisiana, 410 U.S. 702, 714. The authority cited for this holding was United States v. California, 332 U.S. 19, 39-40 (1947).

3. In California, the Court held that the United States may not be deprived of interests, which it holds in trust for all the people, either by the acquiescence of its officers, or by their laches or failure to act. 332 U.S. at 39-40. An examination of the citations given to support this principle reveals that this Court has only declined to rely on rights that States assert which apply the same rule to the Government now. [illegible]

4. In California, the Court was concerned with the rule, as between the United States and the State of California, to the three mile belt of soil under the navigable sea. The opinion discusses at considerable length, the inland water rule of Pollard's Lessee v. Hagan, 3 How. 212 (1845), in which the Court held that the original States, as well as the States later admitted to the Union on an equal footing, owned the soil beneath the navigable waters within their boundaries, in trust for their people, and as an inseparable attribute of State sovereignty. In the California case the United States questioned the validity of Pollard Hagan, as it had held that ownership of the soil beneath navigable waters is inherently incident of State sovereignty. But the Court

refused to accept this argument and stated that it had reasserted this basic doctrine of *Pollard* many times. 332 U.S. at 50-57. A sovereign State cannot abdicate its jurisdiction over the soil beneath its navigable waters, held in trust for all its people, and it can only dispose of such soil by a valid exercise of legislative power, consistent with its trust to the people of the State. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-463 (1892).

5. The line of cases upon which this Court relied in the order of March 5, 1973, must be read in the light of *Pollard's Lessee v. Hagan*, *supra*, *United States v. California*, *supra*, and *Illinois Central Railroad v. Illinois*. As already noted, the cases upon which the Court relied stem from *Rhode Island v. Massachusetts*, *supra*, in which the location of the boundary had been settled by a valid exercise of legislative power. Prior to the Revolution the two colonies had appointed commissions to meet and settle the boundary, and the recommended settlement was approved by each of the respective legislatures. Rhode Island's acquiescence was referred to in connection with this solemn agreement. 4 How. at 638-639. It will be found that in most of the other cases which follow the language of *Rhode Island*, there had also been a proper compact between the disputant States or some equivalent thereto. To read the language of those cases as holding that acquiescence, laches, or failure to act are alone sufficient to deprive a State of an attribute of its sovereignty, is to place them in conflict with *Texas v. Louisiana*, *supra*, and with *Pollard*, *California* and *Illinois Central*.

6. The Ohio River is a navigable stream, and Ohio is a sovereign State. Assuming the truth of the allegations in Ohio's proposed amended complaint as to the location of the boundary in the middle of the River, which allegations have been admitted by Kentucky for present purposes (410 U.S. at 645), the soil beneath the northern

[redacted]

[redacted]

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 27, Original

THE STATE OF OHIO

Plaintiff,

v.

THE COMMONWEALTH OF KENTUCKY

Defendant.

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

Ohio was admitted to the Union in 1803, as a sovereign State, on equal footing with Kentucky and with the thirteen original States. The allegations of Ohio's proposed amended complaint, if proven, will establish that, when she became a State, Ohio's boundary with Kentucky lay at the middle of the Ohio River and that she was entitled to the soil beneath the northern half of the River. Kentucky's argument to the contrary was found to be without merit by the Special Master. (Rep. 3-4.)*

The Special Master recommended, nevertheless, that the motion to amend the complaint be denied. His reason was that, regardless of where the boundary actually lay

* References to the Report of the Special Master, filed May 13, 1977 will be designated herein as "Rep."

to the time Ohio became a State, her long acquiescence in Kentucky's claim to the northern edge of the River foreclosed Ohio's present claim to the southern half of the River. (Rep. 4-15.) The Special Master relied upon a series of cases in this Court which contain language to the effect that, in border disputes between States, long acquiescence by one in the claim of the other is conclusive. (Rep. 12-15.) In an opinion dated March 5, 1973, this Court accepted the Special Master's recommendation and cited the same cases, *Ohio* v. *Kentucky*, 410 U.S. 641, 650-651 (1973).

On March 20, 1973, this Court handed down its opinion in *Texas* v. *Louisiana*, 410 U.S. 702, in which it held, among other things, that a State may not acquire territory from the United States by prescription and acquiescence. 410 U.S. at 714. We respectfully submit that the same rule holds good for any sovereignty, that a sovereign State can no more be deprived of its territory by mere acquiescence than can the sovereign United States; and that the cases upon which this Court relied in its opinion of March 5, 1973, must be read in the light of this principle.

An original action in this Court is, of course, a trial, and interlocutory orders entered therein are open to reconsideration at any time prior to final judgment.

ARGUMENT

I. The Order of March 5, 1973.

The basis of this Court's denial of leave to amend Ohio's complaint appears in the following paragraph in the opinion of March 5, 1973 (410 U.S. at 650-651):

> (a) Ohio does not say that its failure to assert its claim over the past century and a half is due to any

Jurisdiction, 332 U.S. 19 (1947), and (c) *Pollard's Lessee v. Hagan*, 3 How. 212 (1845).

a.) *Texas v. Louisiana*. The Court decided that the boundary between the two States had been established at the middle of the Sabine River in 1848. However, since there was some evidence that islands in the western half of the river were owned by the United States prior to 1848, the case was remanded to the Special Master to permit the government to state its claim. Texas had argued that such claim had been lost by prescription and acquiescence. The Court brushed aside this contention with the statement that the United States could not lose territory by acquiescence. The opinion says (410 U.S. at 713, 714):

> It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. *Scott v. Lattig*, 227 U.S. 229, 242-243 (1913); *County of St. Clair v. Lovingston*, 23 Wall. 46, 68 (1874); *Pollard's Lessee v. Hagan*, 3 How. 212, 228-230 (1845). But the rule does not reach islands or fast lands located within such waters. Title to islands remains in the United States. * * *
>
> * * * * * * * * * * * *
>
> * * * Texas claims any such islands existing prior to 1848 by prescription and acquiescence, but, plainly, a State may not acquire property from the United States in this manner. *United States v. California*, 332 U.S. 19, 39-40 (1947).

b.) *United States v. California*. The issue was the ownership of the three mile belt of soil beneath the marginal sea. California contended that, since it had been admitted to the Union on equal footing with the original States, its ownership of the sub-soil of the marginal sea followed from the rule announced in *Pollard's Lessee v.*

Hagen rule. This Court's opinion in *California* described that rule as a holding, 332 U.S. at 30, that

> the original States entered in trust for their people the navigable sidewalks between high and low water mark within each state's boundaries, and the soil beneath them, as an inseparable attribute of state sovereignty.

The Government questioned the validity of *Pollard* insofar as it held that ownership of the soil beneath navigable waters is a necessary incident of State sovereignty. This Court did not accept this argument, pointing out that it had frequently reasserted this basic doctrine of *Pollard*. 332 U.S. at 30-31. It did, however, limit the extent of the *Pollard* rule to inland waters, and held for the United States on the ground that the soil beneath the marginal sea is an attribute of external national sovereignty. 332 U.S. at 35-40. Finally, in response to California's argument that the federal government had lost its claim through acquiescence in the State's exercise of sovereignty, the Court said:

> And even assuming that Government agents may have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this area [are] not to be forfeited as a result. The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act." (332 U.S., at 39-40; footnote citing cases omitted.)

Pollard's Lessee v. Hagen. The question was

ownership of a lot which had been under navigable water within the boundaries of Alabama at the time that State was admitted to the Union. One party claimed under a grant from the United States, the other, under an Alabama grant. The Court's opinion notes (3 How. 220) that "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy, * * *." The Court held, as we have just shown from the references to *Pollard* in *Texas* and *California*, that any State which entered the Union after the Revolution acquired title to the soil beneath the navigable waters within its boundaries, in trust for the people of the State, as an inseparable attribute of its sovereignty. In addition to the passages already quoted the opinion says (3 How. at 221, 222-223, 228-229, 230):

> * * * The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed. * * *
>
> * * * * * * * * *
>
> * * * When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it to the same extent, in all respects, that it was held by the states ceding the territory.
>
> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign powers. * * *
>
> * * * * * * * * *

Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original States. * * * There to Alabama belong the navigable waters, and soils under them, subject only to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

* * * * * * * * *

* * * This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of public powers. * * *

In brief summary of these three cases, it is clear that both the United States, and the individual States of the Union, possess sovereign powers; that both the United States, and the individual States as an inseparable incident of such sovereignty, hold the lands beneath the navigable waters within their respective jurisdictions in trust for their respective peoples; and that the only limitations upon the title of any individual State to such lands are to be found in the powers surrendered to the United States under the Constitution. We think it follows that a State can no more be deprived of such trust property, by mere acquiescence in an adverse claim, than can

the United States. And we think it will become apparent from the next section that this Court has recognized that principle.

III. A Sovereign State Cannot Be Deprived of Such Lands By Mere Acquiescence.

In the above quotation from *United States* v. *California*, in which the Court held that the United States could not be deprived of trust property by acquiescence, we noted that a footnote containing authorities for that proposition had been omitted. 332 U.S. at 40. One of those authorities is *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409, (1917), which in turn cited a number of this Court's previous cases on the same point. But the *Utah Power* opinion also cites *State ex rel. Lott* v. *Brewer*, 64 Ala. 287, 298 (1879), *State* v. *Brown*, 67 Ill. 435, 436 (1873), and *Den* v. *Lunsford*, 20 N. Car. 407 (1839), all of which hold that a sovereign State may not be deprived of its property by the acquiescence or laches of its officers. The following passage from the *Brown* case is typical:

> It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at a fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officials, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.
>
> The doctrine is well settled that no *laches* can be imputed to the government, and by all the same

reasoning which excuses it from laches; and on the same grounds it should not be affected by the negligence or even willfulness of any one of its officials. (87 Ill. at 438.)

The reliance upon these State cases, we respectfully submit, shows that this Court recognized all sovereignties as equally entitled to the benefit of the rule. Furthermore, the Court has held that a State may only dispose of the soil beneath its navigable waters by a valid exercise of its legislative power consistent with its trust for the people of the State, and that any legislative disposition inconsistent with such trust is void. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-454, 454-455, 460 (1892), the Court said:

> * * * the State holds title to the lands under the navigable waters of Lake Michigan, within its limits, * * * It is a title held in trust for the people of the State that they may enjoy the navigation * * *, carry on commerce * * *, and have liberty of fishing therein freed from the obstruction or interference of private parties.
>
> * * * It is *grants of parcels of land under navigable waters*, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being reclaimed, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very *different doctrine from the one which would* sanction the *abdication of the general control* of the state over *lands under the navigable waters of an entire harbor or bay*, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of a State to preserve such waters for the use of the

public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *The control of the State for the purposes of the trust can never be lost*, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * * So with trusts connected with public property, or property of a special character, like *lands under navigable waters*, they cannot be *placed entirely beyond the direction and control of the State*.

* * * * * * * * *

* * * It is hardly conceivable that a legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust under which it is held. So would a similar transfer to a corporation of another State. *It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself.* * * *

* * * * * * * * *

* * * We hold, therefore, that any attempted cession of the ownership or control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, * * *. (Emphasis supplied.)

The Supreme Court of the State of Ohio adopted the reasoning of *Illinois Central* in two cases involving own-

ership of the soil beneath the waters of Lake Erie. In *State* v. *Cleveland & Pittsburgh Railroad Co.*, 94 Ohio St. 61, 79, 80 (1916), that court said:

> As shown, the state holds title to the subaqueous land as trustee for the protection of public rights. The power to prescribe * * * regulations resides in the legislature of the State.
>
> * * * * * * * * *
>
> The state as trustee for the public cannot by acquiescence abandon the trust property or enable a diversion of it to private ends different from the object for which the trust was created. (Emphasis supplied.)

And in *State, ex rel. Squires* v. *Cleveland*, 150 Ohio St. 303, 322-326, 336-339 (1948), the court strongly reaffirmed its prior holding.

In short, a sovereign State holds the soil beneath navigable waters within its boundaries in trust for all its people. It cannot be deprived of such trust property by mere acquiescence in the adverse possession of another State, and it can only dispose of it by legislative action consistent with the purpose of the trust under which it is held. See also *Martin* v. *Waddell*, 16 Pet. 367 (1842); *Barney* v. *Keokuk*, 94 U.S. 324, 337 (1876); *Shively* v. *Bowlby*, 152 U.S. 1 (1893); *Massachusetts* v. *New York*, 271 U.S. 65 (1926); *United States* v. *Maine*, No. 35, Original, Motion of United States for Judgment, p. 37.

IV. The Cases Relied On in the Order of March 5, 1973, Must Be Read in the Light of the Above Principles.

Ohio is a sovereign State of the Union, and the Ohio River is a navigable stream. If it be assumed that the allegations as to the location of the boundary in Ohio's proposed amended complaint can be established, and they

have been admitted by Kentucky for present purposes (410 U.S. at 645), the soil beneath the northern half of the River belonged to Ohio in trust for the people of the State at the time of her admission to the Union. In the order of March 5, 1973, this Court ruled that, regardless of the justice of Ohio's historical claim, she had lost the right to assert it because of the long acquiescence of her officials in the adverse claim of Kentucky. 410 U.S. 641, 648-652. The Court relied on a series of cases which begin with *Rhode Island* v. *Massachusetts*, 4 How. 591 (1846).

The *Rhode Island* case was the first boundary dispute between States to be litigated to a conclusion before this Court. That litigation continued for many years as the Court carefully picked its way through an unfamiliar field, which, though political in nature, had been committed to its jurisdiction under the Constitution. See 12 Pet. 657 (1838); 13 Pet. 23 (1839); 14 Pet. 210 (1840); 15 Pet. 233 (1841); 4 How. 591 (1846). In the last of these decisions, written by Justice McLean, the Court finally rejected Rhode Island's claim on the ground that, in 1711 and again in 1718, the legislature of the Colony of Rhode Island had formally agreed with the legislature of the Colony of Massachusetts as to the location of the boundary, and that, thereafter, Rhode Island had acquiesced in this agreement for forty or fifty years before beginning its effort to have it set aside on the ground that it was based on a mistake. 4 How. at 638-639. This is the opinion on which this Court now relies.

One of the earlier opinions in this series has been cited at times in support of the defense of acquiescence. *Rhode Island* v. *Massachusetts*, 14 Pet. 210 (1840). Chief Justice Taney, writing for the majority there, held that a formal legislative agreement between States, and acquiescence

Missouri v. Iowa, 7 How. 660, 670-674 (1849). We do not

say that the line between mere acquiescence in adverse possession and acquiescence in a proper legislative act has always been carefully drawn in these opinions. But, as this Court said in *Illinois Central Railroad* v. *Illinois*, *supra*, 146 U.S. at 453:

> * * * General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. * * *. (Emphasis supplied.)

To construe the language of these cases as this Court has done in its order of March 5, 1973, is to read them in a way which conflicts with *California*, *Pollard* and *Illinois Central Railroad*.

The State of Ohio, which, for present purposes, must be assumed to have included the soil beneath the northern half of the Ohio River within her boundaries at the time she entered the Union, has never taken any legislative action to dispose of that trust property. Efforts were made in 1813, in 1848, in 1877, in 1958, and perhaps at other times, to work out a settlement of the location of Ohio's boundary in the River. All were futile. The acquiescence of her officials in the adverse possession of Kentucky, and their laches in asserting her trust rights, cannot deprive the State of Ohio of those rights, any more than the acquiescence and laches of federal officials could deprive the United States of her trust property in the soil beneath the marginal sea in *United States* v. *California*, *supra*. And the State of Ohio, not being a party to either *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), or *Indiana* v. *Kentucky*, 136 U.S. 479 (1890), to which this Court referred in the order of March 5, 1973, is not bound by those decisions. *Fowler* v. *Lindsey*, 3 Dallas 411

CONCLUSION

In view of the foregoing, the Court's order of March 5, 1973, should be reconsidered.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio,

WILLIAM B. SAXBE
United States Senator
from the State of Ohio,
Of Counsel.
October, 1973.

GEORGE K. JANICKI
First Assistant Attorney General

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Assistant Attorney General

CERTIFICATE OF SERVICE

I, Joseph M. Howard, Assistant Attorney General of The State of Ohio, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1973, I served copies of the foregoing motion for leave to file, motion for reconsideration and brief in support, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
Assistant Attorney General

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IN THE

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OCTOBER TERM, 1973

No. 27, Original

THE STATE OF OHIO

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vs.

THE COMMONWEALTH OF KENTUCKY

Defendant.

SECOND MOTION FOR LEAVE TO FILE MOTION FOR RECONSIDERATION OF ORDER OF MARCH 5, 1973.

On March 5, 1973, this Court entered an order denying Ohio's motion for leave to amend its original complaint. The purpose of the proposed amendment was to allege that the boundary between the two States lies at the middle of the Ohio River. The Court held this issue barred on the sole ground that Ohio had, for many years, acquiesced in Kentucky's claim to the northern half of the River. 410 U.S. 641, 643-652.

On October 2, 1973, Ohio asked leave to file a motion for Reconsideration of the order of March 5, 1973, contending that the Court's reliance on acquiescence was inconsistent with *Texas* v. *Louisiana*, 410 U.S. 702 (1973), *United States* v. *California*, 332 U.S. 19 (1947), *Utah Power & Light Co.* v. *United States*, 243 U.S. 389

(1947); *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892); *Pollard's Lessee v. Hagan*, 3 How. 212 (1845). In those cases the Court held that a sovereign, be it the United States, or a [illegible] cannot be deprived of territory within its boundaries by mere acquiescence in the adverse possession of another.

On October 23, 1973, the Court entered the following order:

> The motion for leave to file a petition for rehearing is denied. (Emphasis added.)

We submit that this disposition of the Motion for Reconsideration conflicts with other decisions of this Court, and we renew our request for leave to file the Motion for Reconsideration. There is no possibility of appeal to a higher court in an original case. And the Court has said, in *Virginia v. West Virginia*, 222 U.S. 17, 19-20 (1911):

> A question like the present should be disposed of without undue delay. But a State cannot be expected to move with the celerity of a private businessman; it is enough if it proceeds, in the language of English Chancery, with all deliberate speed. . . .

We reproduce below both the Motion for Reconsideration and the Brief in Support thereof, as originally presented to the Court on October 2, 1973, with several minor modifications. The name of William B. Saxbe, United States Senator from Ohio, which appeared of counsel at that time, has been withdrawn in view of his subsequent appointment as Attorney General of the United States.

I.

Since the Court treated the Motion for Reconsideration as a petition for rehearing, we assume that leave to file was denied on the ground that it was untimely under

the Court's Rule 58. But an original action, instituted under this Court's Rule 9, is a trial, not an appellate proceeding; and Rule 9 provides that, in original actions the Court will take the Federal Rules of Civil Procedure as a guide wherever appropriate. It is a well recognized feature of trial practice that a trial judge, or a trial court, or the presiding officer in an administrative hearing, may, at any time before final judgment, be asked, by means of a motion for reconsideration, to change a previous ruling. See, e.g., *Communist Party of Indiana* v. *Whitcomb*, No. 72-1040, decided January 9, 1974, 42 Law Week 4129; and *Christman* v. *New York Dept. of Labor*, No. 72-6520, decided January 21, 1974, 42 Law Week 4181. In the latter case, this Court said (in footnote 10):

> * * * Moreover, a construction of the regulation as barring reconsideration and correction despite the State's failure to provide the notice required by the regulations might raise independent constitutional questions.

There can be no doubt that a trial court has inherent power to alter interlocutory rulings in a case, at any time prior to final judgment. That authority was succinctly expressed in *United States* v. *Desert Gold Mining Company*, 433 F. 2d 713, 715 (C.A. 9, 1970), as follows:

> * * * The judgment therefore *remained subject to reconsideration* and revision either by the same judge, a successor judge or a different judge to whom the case might be assigned. * * * The question before this court then becomes whether or not the action taken was a proper exercise of judicial discretion. * * * Having in mind that one judge should not overrule another except for the most cogent reasons, we do not believe the action of the successor district judge was an abuse of discretion. * * *. (Emphasis added.)

See also *Hoffman* v. *Blaski*, 363 U.S. 335, 336-338, 340-

341, footnote 3 (1956); *United States v. Shotwell Mfg. Co.*, 355 U.S. 233 (1958); *United States v. Shotwell Mfg. Co.*, 371 U.S. 341 (1963).

If, as we have assumed, leave to file Motion for Reconsideration was denied as untimely, we submit that, in view of the foregoing, leave to file should not be granted.

II.

If, on the other hand, leave to file was denied on the ground that no good reason had been presented for reconsideration of the order of March 5, 1973, that decision should be reexamined. We recognize that, as the court of appeals said in *Desert Gold*, the question of reconsideration of a prior order is discretionary with the trial court and a change in the order should only be made for some cogent reason. There are such cogent reasons here.

This Court's order of March 5, 1973, denying Ohio's motion for leave to amend its complaint, was based solely on the ground that Ohio was estopped from claiming to the middle of the Ohio River, because it had acquiesced for many years in Kentucky's claim to the northern half of the River. The Court refused leave to file Ohio's Motion for Reconsideration on October 23, 1973. On that same day, however, the Court summarily reversed the Court of Appeals for the Ninth Circuit in *Immigration & Naturalization Service v. Hibi*, No. 72-1652, 414 U.S. 5. In that case the Commissioner of Immigration rejected as untimely the citizenship applications of an alien who had served in the armed forces of the United States, and who was entitled to citizenship provided his application had been filed on or before December 31, 1946. The record showed that officials of the Immigration Service had taken affirmative steps to prevent aliens such as this petitioner from being timely informed of their rights. Both

the district court and the court of appeals held that the Service was estopped from denying the petition. This Court reversed the decision below, without argument, and solely on the Solicitor General's petition for certiorari. The Court's opinion said (414 U.S. at p. 8):

> It is well settled that the Government is not in a position identical to that of a private litigant with respect to its enforcement of laws enacted by Congress.
>
> "As a genral rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest. * * * A suit by the United States to enforce and maintain its policies respecting lands which it holds in trust for all the people stands upon a different plane in this and some other respects from the ordinary private suit to regain the title to real property or remove a cloud from it." *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 409.

The *Utah Power and Light* case, the sole authority relied upon by the Court, was one of the cases upon which we relied, in the Motion for Reconsideration, to show that the rule that a sovereign cannot be deprived of trust property by mere acquiescence applies to the States as well as to the United States. See Brief, *infra*. The summary reversal of *Hibi* cannot be reconciled with the simultaneous denial of leave to file Ohio's Motion for Reconsideration.

The opinion in *Hibi* did note that the issue of estoppel against the Government by "affirmative misconduct" had been left open in *Montana* v. *Kennedy*, 366 U.S. 308 (1961). But the Court found no such "affirmative misconduct" in *Hibi*, and certainly there is nothing in the present record which, by comparison with *Hibi*, could be so described. Even if there were such misconduct, the Mo-

[illegible] should not be summarily deprived of its title without full consideration, since that was the basis upon which it was originally [illegible]

Furthermore, the Court recently held that the Oneida Indian Nation could not be deprived of certain land in the State of New York despite a cession of such land by the tribe to the State in 1795. *Oneida Indian Nation v. County of Oneida*, No. 72-851, January 21, 1974. The Court held (slip opinion, p. 5) that Indian title "could be terminated only by sovereign act. * * * Indian title was [illegible] extinguishable only by the United States." Hence, the tribe could not be estopped by its unauthorized cession. Here, Ohio traces its claim of title back to the Indian tribes through their various treaties with the British Crown and with the United States. See Ohio's Brief in Support of Exceptions to the Special Master's Report, pp. 16-20.

It should be noted also that the Supreme Court of Mississippi recently held that the State legislature had no authority to convey, to private owners for private purposes, submerged land held in trust by the State for all its citizens. *International Paper Co. v. Mississippi*, 271 So. 2d 356 (1973). The conveyances had taken place in 1896, 1897 and 1917, and the corporation and its predecessors had paid taxes to the State, and had exercised full dominion over the land, from the time of the conveyances. A petition for certiorari was filed by the corporation and opposed by the State. In the course of the opposition, the State said in part (No. 72-1603, p. 10):

"The assertion that such sovereign rights can be lost to the people of the state because of the unauthorized acts of public officials of the state is the same theory rejected by this Court in *Illinois Central Railroad Co.*, 146 U.S. 387, and in *United States v. California*, 332 U.S. 19. * * *"

This Court denied the petition for certiorari on October 9, 1973, 414 U.S. 827.

In the brief in support of the Motion for Reconsideration, we called attention to repeated instances in which this Court has held that a sovereign, whether a State or the United States, cannot be deprived of its territory by mere acquiescence in the adverse claim of another. We relied on *Texas* v. *Louisiana*, *United States* v. *California*, *Utah Power & Light Co.* v. *United States*, *Illinois Central Railroad Co.* v. *Illinois*, and *Pollard's Lessee* v. *Hagen*, all *supra*. We urged that the cases upon which the order of March 5, 1973, relied, all involved something more than a mere acquiescence in an adverse claim, and that to read them otherwise would bring them into conflict with *California*, *Pollard*, and *Illinois Central*. See Brief in Support, *infra*.

The Court's opinion denying the motion for leave to amend refers to Ohio's failure to raise the present claim previously in this Court, to prior contrary admissions by Ohio officials, and to a decision by the Supreme Court of Ohio, involving two private parties, which is said to have explicitly recognized the validity of Kentucky's claim. 410 U.S. at 647-652. But the failure to institute an earlier action in this Court amounts to nothing more than mere acquiescence. The admissions of Ohio officials cannot be held to have estopped the State from claiming territory which belongs to her by sovereign right. *United States* v. *California*, *supra*, 332 U.S. at 39-40. And, as to the decision of the Supreme Court of Ohio, *Booth* v. *Shepherd*, 8 Ohio St. 243 (1859), we respectfully submit that this Court has simply misread that case.* But even if this

* The only issue between the two private parties in *Booth* was whether the Virginia-Ohio boundary lay at the top of the Ohio bank or at the low-water mark on the Ohio side. The opinion must be read as a whole in the light of that issue. The syllabus, which is controlling in Ohio, holds only that the territorial limits of the State extend at least to the low water mark on the Ohio side, 8 Ohio St. at 243. As late as 1912, the Supreme Court of Ohio again (as in *Booth*) refused to decide whether the territorial limits of the State extend to the center of the Ohio River, since the issue was only incidental to the case before it. *Board of Health* v. *Greenville*, 86 Ohio St. 1, 27-39 (1912).

Court's conclusion of North Dakota's consent; the finding effect ascribed to it with respect to the State of Ohio, which was not a party to the case, is inconsistent with this Court's decision in *Durfee v. Duke*, 375 U.S. 106 (1963). Third, a dispute between the two private parties as to ownership of land along the Missouri River between Nebraska and Missouri resulted in an action in a Nebraska court. That Court found the land to be in Nebraska and decided accordingly. The losing party then brought suit in Missouri and the case eventually ended in this Court which held the Nebraska decision to be res judicata. In the course of its opinion the Court said (375 U.S. at 115-116):

> It is to be emphasized that all that was ultimately determined in the Nebraska litigation was title to the land in question *between parties to the litigation there. Nothing there decided*, and nothing that could be decided in litigation between the same parties or their privies in Missouri, *could bind either Missouri or Nebraska* with respect to any controversy they might have, now or in the future, *as to the location of the boundary between them, or as to their respective sovereignty over the land in question. Fowler v. Lindsey*, 3 Dall. 411; *New York v. Connecticut*, 4 Dall. 1; *Lord v. Dollar*, 230 U.S. 731, 736-737. *Either State may at any time protect its interest by initiating independent judicial proceedings here.* Cf. *Missouri v. Nebraska*, 196 U.S. 23. (Footnote omitted—Emphasis added.)

The effect of the *Durfee* decision is involved in a presently pending petition for certiorari *Dravo Corporation v. Illinois*, No. 73-963.

In view of the inconsistencies noted above, we respectfully submit that this motion for leave to file should be granted, and that the Motion for Reconsideration should

be granted and referred to the Special Master for consideration and recommendation.

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April, 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 27, Original

THE STATE OF OHIO

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY

Defendant.

MOTION FOR RECONSIDERATION OF ORDER OF MARCH 5, 1973

Comes now the State of Ohio, by its Attorney General, and requests that the Court reconsider its order of March 5, 1973. Under that order Ohio was refused leave to amend its original complaint by the addition of allegations which, if true, lead to the conclusion that the boundary between the Commonwealth of Kentucky and the State of Ohio lies in the middle of the Ohio River. The Court's order of March 20, 1973, in *Texas* v. *Louisiana*, No. 36, Original, is inconsistent with the order of March 5, 1973.

1. The order of March 5, 1973, denying Ohio's request for leave to amend its complaint, was based solely on the conclusion that Ohio had, for many years, acquiesced in Kentucky's claim of sovereignty over the northern half of the Ohio River. *Ohio* v. *Kentucky*, 410 U.S. 641, 642.

652. The order placed reliance on a series of opinions by this Court, beginning with *Rhode Island* v. *Massachusetts*, 4 How. 591, 630 (1846), which contain language to the effect that one State may lose territorial rights by long acquiescence in the exercise of sovereignty and dominion over such territory by a sister State.

2. The order of March 20, 1973, decided, among other things, that a State plainly may not acquire title to land from the United States based on the acquiescence of the United States in the State's long continued exercise of jurisdiction. *Texas* v. *Louisiana*, 410 U.S. 702, 714. The authority cited for this holding was *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

3. In *California*, the Court held that the United States may not be deprived of interests, which it holds in trust for all the people, either by the acquiescence of its officers, or by their laches or failure to act. 332 U.S. at 39-40. An examination of the citations given to support this principle reveals that this Court has not hesitated to rely on cases from the State courts which apply the same rule to the States.

4. In *California*, the Court was concerned with the title, as between the United States and the State of California, to the three mile belt of soil under the marginal sea. The opinion discusses at considerable length, the inland water rule of *Pollard's Lessee* v. *Hagen*, 3 How. 212 (1845), in which the Court had held that the original States, as well as the States later admitted to the Union on an equal footing, owned the soil beneath the navigable waters within their boundaries, in trust for their people, and as an inseparable attribute of State sovereignty. In the *California* case the United States questioned the validity of *Pollard* insofar as it had held that ownership of the soil beneath navigable waters is a

necessary incident of State sovereignty. But the Court refused to accept this argument and stated that it had no jurisdiction over the soil beneath navigable waters, held in trust for all its people and from only dispose of such soil by a valid exercise of legislative power, consistent with its trust to the people of the State. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-453 (1892).

5. The line of cases upon which this Court relied in the order of March 5, 1973, must be read in the light of *Pollard's Lessee v. Hagan*, supra, *United States v. California*, supra, and *Illinois Central Railroad v. Illinois*. As already noted, the cases upon which the Court relied stem from *Rhode Island v. Massachusetts*, supra, in which the location of the boundary had been settled by a valid exercise of legislative power. Prior to the Revolution the two colonies had appointed commissions to meet and settle the boundary, and the recommended settlement was approved by each of the respective legislatures. Rhode Island's acquiescence was referred to in connection with this solemn agreement. 4 How. at 639-640. It will be found that in most of the other cases which follow the language of *Rhode Island*, there had also been a proper compact between the disputant States or some equivalent thereto. To read the language of those cases as holding that acquiescence, laches or failure to act are alone sufficient to deprive a State of an attribute of its sovereignty, is to place them in conflict with *Texas v. Louisiana*, supra, and with *Pollard*, *California* and *Illinois Central*.

6. The Ohio River is a navigable stream, and Ohio is a riparian State. Assuming the truth of the allegations in Ohio's proposed amended complaint as to the location of the boundary in the middle of the River, which allegations have been admitted by Kentucky for present purposes (410 U.S. at 645), the soil beneath the northern

half of the River belongs to Ohio, in trust for her people, and as an attribute of her sovereignty as a State. It cannot be [illegible] by [illegible]. The location of the boundary can only be settled by a compact between the two States or by a decree from this Court.

The Court said, in its order of March 5, 1973, 410 U.S. at 644, that its object in original cases is:

> * * * to have the parties, as promptly as possible, reach and argue the merits of the controversy presented.

But the Court has also said, in *Rhode Island* v. *Massachusetts*, 14 Pet. 210, 257 (1840):

> * * * it will be the duty of the court to mould the rules * * * to bring this case to a final hearing on the *real merits*. (Emphasis supplied.)

And the Court has said in *Virginia* v. *West Virginia*, 234 U.S. 117, 121 (1913), that its guiding principle in such cases should be that

> * * * there may be no room for the slightest inference that * * * anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case. * * *

We respectfully submit that the order of March 5, 1973, which deprives Ohio of an opportunity to present the real merits of its case, should be reconsidered.

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April, 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 27, Original

THE STATE OF OHIO

Plaintiff,

vs.

THE COMMONWEALTH OF KENTUCKY

Defendant.

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

INTRODUCTION

Ohio was admitted to the Union in 1803, as a sovereign State, on equal footing with Kentucky and with the thirteen original States. The allegations of Ohio's proposed amended complaint, if proven, will establish that, when she became a State, Ohio's boundary with Kentucky lay at the middle of the Ohio River and that she was entitled to the soil beneath the northern half of the River. Kentucky's argument to the contrary was found to be without merit by the Special Master. (Rep. 3-4.)*

The Special Master recommended, nevertheless, that the motion to amend the complaint be denied, his reason was that, regardless of where the boundary actually lay

* Reference is to the Report of the Special Master, filed May 15, 1972 and designated herein as "Rep."

at the time Ohio became a State, her long acquiescence in Kentucky's claim to the northern edge of the River foreclosed Ohio's present claim to the northern half of the River. (Rep. 4-10.) The Special Master relied upon a series of cases in this Court which contain language to the effect that, in border disputes between States, long acquiescence by one in the claim of the other is conclusive. (Rep. 12-13). In an opinion dated March 5, 1973, this Court accepted the Special Master's recommendation and cited the same cases. *Ohio v. Kentucky*, 410 U.S. 641, 650-651 (1973).

On March 20, 1973, this Court handed down its opinion in *Texas v. Louisiana*, 410 U.S. 702, in which it held, among other things, that a State may not acquire territory from the United States by prescription and acquiescence. 410 U.S. at 714. We submit that the same rule holds good for any sovereignty, that a sovereign State can no more be deprived of its territory by mere acquiescence than can the sovereign United States, and that the cases upon which this Court relied in its opinion of March 5, 1973, must be read in the light of this principle.

An original action in this Court is, of course, a trial, and interlocutory orders entered therein are open to reconsideration at any time prior to final judgment.

ARGUMENT

I. The Order of March 5, 1973.

The basis of this Court's denial of leave to amend Ohio's complaint appears in the following paragraph in the opinion of March 5, 1973 (410 U.S. at 650-651):

> Ohio does not say that its failure to assert its claim over the past century and a half is due to any excusable neglect. The implications of *Howdy* and later decisions of this Court are too clear to support

[redacted] credibly suggest that it has not acquiesced. The rule, long settled and never doubted by this court, [redacted] is that long acquiescence by one state in the possession adverse to another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and political authority." Michigan v. Wisconsin, 270 U.S. 295, 308 (1926). To like effect are Vermont v. New Hampshire, 289 U.S. 593, 613 (1933); Maryland v. West Virginia, 217 U.S. 1, 17, 42-43 (1910); Louisiana v. Mississippi, 202 U.S. 1, 52-54 (1906); Virginia v. Tennessee, 148 U.S. 503, [redacted] (1893); Indiana v. Kentucky, 136 U.S. 479, at 509-510, 518 (1890); Rhode Island v. Massachusetts, 4 How. 591, 639 (1846)." [Footnotes omitted.]

As will be seen below, the language of the cases cited in this passage must be read in the light of other cases in this Court which hold that, upon admission to the Union, a State, taking title to all unappropriated lands within its boundaries, and especially to the soil beneath its navigable waters, to be held in trust for the people of the State as an attribute of its sovereignty, the State cannot be deprived of such property except by a valid exercise of its legislative power, consistent with the public trust under which the lands are held.

II. The Lands Beneath Navigable Waters Are Held in Trust by a Sovereign State for All Its People.

The statements in the last paragraph above are borne out by an examination of the Court's opinions in (a) Pollard v. Hagan, supra; (b) United States v. California, 332 U.S. 19 (1947); and (c) Pollard's Lessee v. Hagan, 3 How. 212 (1845).

a.) Texas v. Louisiana. The Court decided that the

boundary between the two States had been established at the middle of the Sabine River in 1848. However, since there was some evidence that islands in the western half of the river were owned by the United States prior to 1848, the case was remanded to the Special Master to permit the government to state its claim. Texas had argued that such claim had been lost by prescription and acquiescence. The Court brushed aside this contention with the statement that the United States could not lose territory by acquiescence. The opinion says (410 U.S., at 713, 714):

> It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. *Scott* v. *Lattig*, 227 U.S. 229, 242-243 (1913); *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68 (1874); *Pollard's Lessee* v. *Hagen*, 3 How. 212, 226-230 (1845). But the rule does not reach islands or fast lands located within such waters. Title to islands remains in the United States. • • •
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> • • • Texas claims any such islands existing prior to 1848 by prescription and acquiescence, but, plainly, a State may not acquire property from the United States in this manner. *United States* v. *California*, 332 U.S. 19, 39-40 (1947).

b.) *United States* v. *California*. The issue was the ownership of the three mile belt of soil beneath the marginal sea. California contended that, since it had been admitted to the Union on equal footing with the original States, its ownership of the subsoil of the marginal sea followed from the rule announced in *Pollard's Lessee* v. *Hagen*, *supra*. This Court's opinion in *California* describes that rule as a holding, 332 U.S. at 35, that

> • • • the original states owned in trust for their people the navigable tidewaters between high and

[illegible] water, [illegible] state's boundaries, [illegible] as an incident of [illegible] sovereignty.

The Government questioned the validity of Pollard insofar as it held that ownership of the soil beneath navigable waters is a necessary incident of State sovereignty. The Court did not accept this argument, pointing out that it had frequently reasserted the basic doctrine of Pollard. 332 U.S. at 36-37. It did, however, limit the extent of the Pollard rule to inland waters, and held for the United States on the ground that the soil beneath the marginal sea is an attribute of external national sovereignty. 332 U.S. at 39-40. Finally, in response to California's argument that the federal government had lost its claim through acquiescence in the State's exercise of sovereignty, the Court said:

> And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who [illegible] authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by [illegible] acquiescence, laches or failure to act." (332 U.S. at 39-40, footnote citing cases omitted.)

c. *Pollard's Lessee v. Hagan.* The question was ownership of a lot which had been under navigable waters within the boundaries of Alabama at the date that State was admitted to the Union. One party claimed under a grant from the United States, the other, under

set Alabama grant. The Court's opinion notes (3 How. 220) that "this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy. * * *." The Court held, as we have just shown from the references to *Pollard* in *Texas* and *California*, that any State which entered the Union after the Revolution acquired title to the soil beneath the navigable waters within its boundaries, in trust for the people of the State, as an inseparable attribute of its sovereignty. In addition to the passage already quoted the opinion says (3 How. at 221, 222-223, 228-229, 230):

> * * * The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; * * *
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> * * * When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it to the same extent, in all respects, that it was held by the states ceding the territory.
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> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign powers. * * *
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> Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine,

III. A Sovereign State Cannot Be Deprived of Such Lands By Mere Acquiescence.

In the above quotation from *United States v. California*, in which the Court held that the United States could not be deprived of trust property by acquiescence, we noted that a footnote containing authorities for that proposition had been omitted. 332 U.S. at 40. One of these authorities is *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409, (1917), which in turn cited a number of this Court's previous cases on the same point. But the *Utah Power* opinion also cites *State ex rel. Lott v. Brewer*, 64 Ala. 287, 296 (1879), *State v. Brown*, 67 Ill. 435, 438 (1873), and *Dev v. Lunsford*, 20 N. Car. 407 (1838), all of which hold that a sovereign State may not be deprived of its property by the acquiescence or laches of its officers. The following passage from the *Brown* case is typical:

> It is a familiar doctrine, that the State is not embraced within the Statute of Limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at a fearful hazard, should this doctrine be applicable to a State. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officials, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.
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> The doctrine is well settled that no *laches* can be imputed to the government, and by all the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials. (67 Ill. at 438.)

The reference from these State cases shows that this Court recognized all accretions as equally entitled to the benefit of the rule. Furthermore, the Court has held that a State may vary the boundaries of the soil beneath its navigable waters by a valid exercise of its legislative power consistent with its trust for the people of the State, and that any legislative disposition inconsistent with such trust is void. In *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452-454, 454-455, 460 (1892), the Court said:

> "* * * the State holds title to the lands under the navigable waters of Lake Michigan, within its limits, * * * It is a title held in trust for the people of the State that they may enjoy the navigation * * * carry on commerce * * * and have liberty of fishing therein freed from the obstruction or interference of private parties. * * *
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> "It is *grants of parcels of land* under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust in the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of that general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of a State to preserve such waters for the use of the public. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the remaining lands and waters, and then only to the extent and under the conditions prescribed by the legislature. The decisions of the State courts, to the effect that the title and dominion of property acquired by the general government in the bays, rivers and lands under the navigable waters of the lakes, within the limits of the States in which they are situated, are held by the same tenure, and may be dealt with by the States to the same extent as the lands above high-water mark within their jurisdiction, may be supported by reasons which we do not feel called upon to controvert. But the decisions of the State courts, that the control of the State over the lands under the navigable waters of lakes and rivers is so entire that it may be wholly surrendered by the State, and the lands transferred to private parties, discharged from the trust for the public purposes of navigation and fishery, are not supported by any reasons or authorities that we are bound to respect. The interest of the people in navigation and in the fisheries can be improved rather than impaired by the disposition of parcels of the lands under the waters in front of the commercial parts of the city, for wharves and docks, and of parcels remote from the city front, and useful only for fishing purposes, for the shore rights of fishermen. But the abdication by the State of the general right to govern the lands under the waters of an entire lake for the benefit of the whole people is a different matter, and cannot be sustained or justified. It is contrary to the principles upon which the trust with which the State holds such lands is founded. It is inconsistent with the purposes for which they are held by the State, and with the exercise of the full power of government over them which the State is bound to maintain unimpaired. The ownership of the navigable waters of the harbor of Chicago, and of the lands under them, by the State, is different in character from that which the State has in lands intended for sale. It is a trust power, which the State cannot abdicate any more than it can abdicate its police powers in the administration of government and the preservation of the peace

bursable of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. * * * So with trusts connected with public property, or property of a special character, like *lands under navigable waters*, they cannot be placed *entirely beyond the direction and control of the State*.

* * * * * * * * * *

* * * It is hardly conceivable that a legislature can divest the State of the control and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust under which it is held. So would a similar transfer to a corporation of another State. *It would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself.* * * *

* * * * * * * * * *

* * * We hold, therefore, that any attempted cession of the ownership or control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, * * *. (Emphasis supplied.)

The Supreme Court of the State of Ohio adopted the reasoning of *Illinois Central* in two cases involving ownership of the soil beneath the waters of Lake Erie. In *State v. Cleveland & Pittsburgh Railroad Co.*, 94 Ohio St. 61, 79, 80 (1916), that court said:

[illegible]

[illegible]

[illegible]

order of March 5, 1973, this Court ruled that, regardless of the justice of Ohio's historical claim, she had lost the right to assert it because of the long acquiescence of her officials in the adverse claim of Kentucky. 410 U.S. 641, 642-652. The Court relied on a series of cases which begin with *Rhode Island v. Massachusetts*, 4 How. 591 (1846).

The *Rhode Island* case was the first boundary dispute between States to be litigated to a conclusion before this Court. That litigation continued for many years as the Court carefully picked its way through an unfamiliar field, which, though political in nature, had been committed to its jurisdiction under the Constitution. See 12 Pet. 657 (1838); 13 Pet. 23 (1839); 14 Pet. 210 (1850); 16 Pet. 233 (1841); 4 How. 591 (1846). In the last of these decisions, written by Justice McLean, the Court finally rejected Rhode Island's claim on the ground that, in 1711 and again in 1718, the legislature of the Colony of Rhode Island had formally agreed with the legislature of the Colony of Massachusetts as to the location of the boundary, and that, thereafter, Rhode Island had acquiesced in this agreement for forty or fifty years before beginning its effort to have it set aside on the ground that it was based on a mistake. 4 How. at 638-639. This is the opinion on which this Court now relies.

One of the earlier opinions in this series has been cited at times in support of the defense of acquiescence. *Rhode Island v. Massachusetts*, 14 Pet. 210 (1840). Chief Justice Taney, writing for the majority there, held that a formal legislative agreement between States, and acquiescence by one State in the long continued possession of territory by another, constitute separate and independent defenses. 14 Pet. at 258-261. Justice McLean dissented on the ground that a legislative agreement followed by long acquiescence must be considered together as one defense.

14 Pet. at 676-79. Six years later, however, Justice Baldwin followed the reasoning of this dissent in writing the majority opinion in the finally dispositive decision in which we have just referred to in the previous paragraph. Only Chief Justice Taney dissented. 4 How., at 639-646.

The *Rhode Island* decision is therefore consistent with the preceding section of this brief. The basis of the decision was not simply that Rhode Island had acquiesced in the Massachusetts claim. Rhode Island, by an act of its legislature, entered into a solemn agreement with Massachusetts settling the disputed boundary, and for a considerable time thereafter acquiesced in that agreement.

The cases which follow *Rhode Island* reveal a similar pattern. The acquiescence argument appears in conjunction (1) with an act of the legislature, as in *Rhode Island*; (2) with an acknowledgment of the location of the boundary in the State Constitution; or (3) with a decision on the question by an authorized tribunal; or (4) with acts of Congress prior to the State's admission to the Union. In the first group are *Virginia* v. *Tennessee*, 148 U.S. 503, 520-525 (1893), and *Indiana* v. *Kentucky*, 136 U.S. 479, 513-515 (1890). In the second are *Michigan* v. *Wisconsin*, 270 U.S. 295, 301-307 (1926), and *Maryland* v. *West Virginia*, 217 U.S. 1, 30-31 (1910). *Vermont* v. *New Hampshire*, 289 U.S. 593, 598-600, 617 (1933), is representative of the third class. And in the fourth is *Louisiana* v. *Mississippi*, 202 U.S. 1, 36-47 (1906); cf. also *Missouri* v. *Iowa*, 7 How. 660, 670-674 (1849). We do not say that the line between mere acquiescence in adverse possession, and acquiescence in a proper legislative act, has always been carefully drawn in these opinions. But, as this Court said in *Illinois Central Railroad* v. *Illinois*, supra, 146 U.S. at 463:

> "General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. . . ." (Emphasis supplied.)

To construe the language of these cases as this Court has done in its order of March 5, 1973, is to read them in a way which conflicts with *California*, *Pollard* and *Illinois Central Railroad*.

The State of Ohio, which, for present purposes, must be assumed to have included the soil beneath the northern half of the Ohio River within her boundaries at the time she entered the Union, has never taken any legislative action to dispose of that trust property. Efforts were made in 1813, in 1848, in 1877, in 1958, and perhaps at other times, to work out a settlement of the location of Ohio's boundary in the River. All were futile. The acquiescence of her officials in the adverse possession of Kentucky, and their laches in asserting her trust rights, cannot deprive the State of Ohio of those rights, any more than the acquiescence and laches of federal officials could deprive the United States of her trust property in the soil beneath the marginal sea in *United States* v. *California*, *supra*. And the State of Ohio, not being a party to either *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), or *Indiana* v. *Kentucky*, 136 U.S. 479 (1890), to which this Court referred in the order of March 5, 1973, is not bound by those decisions. *Fowler* v. *Lindsey*, 3 Dallas 411 (1799); *New York* v. *Connecticut*, 4 Dallas 4 (1799); *Hinderlider* v. *LaPlata Co.*, 304 U.S. 92, 103 (1938); *United States* v. *Nevada*, No. 59, Original, decided June 11, 1973.

CONCLUSION

In view of the foregoing, the Motion for Reconsideration of the Court's order of March 5, 1973, should be granted and referred to the Special Master for consideration and recommendation.

Respectfully submitted,
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Attorney General of Ohio,
GEORGE L. JENKINS
First Assistant Attorney General
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April, 1974

CERTIFICATE OF SERVICE

I, Joseph M. Howard, Assistant Attorney General of The State of Ohio, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1974, I served copies of the foregoing second motion for leave to file, motion for reconsideration and brief in support, by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the Commonwealth of Kentucky.

JOSEPH M. HOWARD
Assistant Attorney General

OHIO v. KENTUCKY

ON MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT

No. 27, Original. Argued January 20, 1972.—Decided March 1, 1972

Ohio sought leave to file an amended bill of complaint in an original action involving a boundary dispute with Kentucky. By the amendment Ohio claimed that the boundary between Ohio and Kentucky was located in the middle of the Ohio River. The motion was referred to the Special Master, who recommended that the motion be denied. *Held:*

1. In the exercise of its original jurisdiction, this Court is not inexorably bound by indigenous procedure or by current rules of civil procedure. The requirement of a motion for leave to file a complaint permits this Court to dispose of it at a preliminary stage in an appropriate case, such as where the claim is barred as a matter of law and a hearing on the issues presented would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants alone bear. Pp. 643-644.

2. Ohio's long acquiescence in the location of the Ohio-Kentucky line at the northern edge of the Ohio River bars Ohio's present claim that the boundary is at the middle of the river. Pp. 646-652.

Motion for leave to file amended bill of complaint denied.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, post, p. 652.

Joseph M. Hoxsted argued the cause for plaintiff on exceptions to the Report of the Special Master. With him on the brief was *William J. Brown*, Attorney General of Ohio.

John B. Breckinridge, Assistant Attorney General of Kentucky, argued the cause for defendant *pro hac vice* in answer to exceptions to the Report of the Special Master. With him on the brief were *Ed W. Hancock*,

Attorney General, and *James M. Rogge*, Assistant Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Almost seven years ago, in March 1965, the State of Ohio instituted this original action against the Commonwealth of Kentucky. By its prayer for relief in its proposed bill of complaint, Ohio asked only that this Court declare and establish:

"1. The boundary line between the State of Ohio and the State of Kentucky as being the low water mark on the northerly side of the Ohio River in the year 1792.

"2. The State of Ohio and the State of Kentucky have equal and concurrent jurisdiction over and on all of the Ohio River from the northerly shore to the southerly shore, except jurisdiction incidental to the ownership of the soil under the river and structures permanently annexed thereto."

In its complaint Ohio alleged:

"4. The State of Ohio was established from the land ceded by legislative act of the Commonwealth of Virginia to the United States on the 1st day of March, 1784, which act is known as the Cession of Virginia.

"5. The State of Kentucky was established by the separation of the District of Kentucky from the jurisdiction of the Commonwealth of Virginia pursuant to that seventh act of the Virginia Legislature entitled 'An Act concerning the erection of the district of Kentucky into an independent state,' passed on the 18th day of December, 1789, which act is known as the Virginia-Kentucky Compact.

Ohio were on its shore. From 1910 to 1929, the United States created locks in the Ohio River for navigational purposes. Since 1955, it has been replacing the earlier locks with higher ones. This has caused the waters of the river to rise and permanently inundate various areas of both Ohio and Kentucky. "As a result, the shores or banks of the Ohio River have been moved farther northerly and southerly as the water levels have increased by the damming of the river." The north low water mark of 1792 "has been obscured by the increased elevation of the water levels." Kentucky has claimed that the line between the two States is "along the present northerly shore line of the Ohio River rather than the 1792 northerly low water mark which is located to the south of the present south shore line." Ohio "does now and has always claimed . . . that the boundary between it and Kentucky is the 1792 northerly low water mark."

Leave to file the bill of complaint was granted. 384 U. S. 922 (1966). Kentucky by its answer admitted the allegations of the above-quoted numbered paragraphs of Ohio's complaint. The Court then appointed the Honorable Phillip Forman as Special Master in the case. 385 U. S. 808 (1966).

Five years later, in August 1971, Ohio moved for leave to file an amended complaint. By this amendment Ohio would assert that the boundary between it and Kentucky is the middle of the Ohio River, or, only alternatively, is the 1792 low water mark on the northerly

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[1] [illegible] 1 Stat. 189.

This case is peculiarly susceptible to treatment of that kind. The allegations in Ohio's proposed amendment are not as yet formally controverted by Kentucky. We, therefore, treat the new material as admitted. Kentucky asserts, however, that, even assuming the new allegations to be true, no cause of action is stated, for the subject matter of Ohio's proposed amendment is barred as a matter of law.

II

In *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), this Court stated that the boundary between Indiana and Kentucky was the low water mark on the western or northwestern side of the Ohio River. *Handly* was an action for ejectment brought by a plaintiff claiming under a grant from Kentucky against defendants claiming under a grant "from the United States, as being part of Indiana." *Id.*, at 375. The disputed land was a neck south of a channel, or bayou, that had formed north of the main river. When the river was high, the channel filled and cut off the land to the north. When the river was low, the channel was dry in part and the separation did not exist. The resolution of the case turned on whether the land was in Indiana or in Kentucky. Indiana, like Ohio, received its territory from the United States. The Court in *Handly* observed that the question "depends chiefly on the land law of Virginia, and on the cession made by that State to the United States," *id.*, at 376, and concluded that the United States acquired title from Virginia when negotiations during the period from 1781–1784 resulted in Virginia's ceding its lands north and west of the Ohio River to the Federal Government.* Kentucky was received as a State of the

*Recommendation of the Continental Congress, September 6, 1780, 10 W. Hening, Laws of Virginia 562 (1822); Resolution of the General Assembly of Virginia, January 2, 1781, conditioned, among other

consistently adhered to in subsequent decisions of this Court. *Indiana v. Kentucky*, 136 U. S. 479 (1890) (despite Indiana's argument, *id.*, at 496-498, that its boundary was the middle of the river); *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592 (1899);[4] *Nicoulin v. O'Brien*, 245 U. S. 112 (1913). It has been explicitly recognized by the Supreme Court of Ohio in *Booth v. Shephard*, 3 Ohio St. 362, 347-348 (1853), where it was stated with far greater precision than the mere assumption the dictum suggests, *post*, at 654-655, that:

"The construction given to the Virginia deed of cession by the supreme court of the United States, having been thus acquiesced in and acted on by the courts, both of Virginia and Ohio, may be regarded as decisive of the question."

See also *Lessee of McCulloch v. Ales*, 2 Ohio 307, 310 (1826); *Lessee of Blanchard v. Porter*, 11 Ohio 138, 142 (1841).[5] See *Commonwealth v. Garner*, 3 Gratt. 655 (Gen. Court of Va. 1846).

In order to counter this history, Ohio argues that, as it was not a party to the *Handly* case, or to any of the later cases in this Court that reaffirmed *Handly*, it is not bound by the rule there established, which it characterizes as dictum. In particular, Ohio contends that it is free to challenge the conclusion that Virginia, prior to ceding

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[4] "Upon this question of boundary nothing can be added to what was said in the cases cited; and it must be assumed as indisputable that the boundary of Kentucky extends to low-water mark on the western and northwestern banks of the Ohio River." *Henderson Bridge Co. v. Henderson City*, 173 U. S. 592, 612 (1899).

[5] There is a possible indication to the contrary in the bridge tax case of *Covington & Cincinnati Bridge Co. v. Meyer*, 21 Ohio St. 317, 337, 339 (1871). The case appears, however, to have been resolved on the taxation of the bridge company's Ohio charter granting permission for the erection of the bridge. See *Sebastian v. Covington & Cincinnati Bridge Co.*, 21 Ohio St. 431 (1871).

the statutes to forgo its claim in favor of the United States for the common good. Accordingly, Ohio contends, the premise of *Handly*—that Virginia had title to the northwest territory prior to ceding it to the United States, or, to say it another way, that it was the common proprietor of lands on both sides of the river—is historically invalid.

We need intimate no view on the merits of Ohio's historical analysis, for the State's long acquiescence in the location of its southern border at the northern edge of the Ohio River, and its persistent failure to assert a claim to the northern half of the river, convince us that it may not raise the middle-of-the-river issue at this very late date. The 1820 decision in *Handly* necessarily placed Ohio on notice that any claim it might assert to half the river would be precluded by the reasoning of that opinion. The Court in *Handly* concluded that the entire border between Indiana and Kentucky was the river's northern edge. Virginia's claim to the territory that is now Indiana arose from the same source as its claim to what is now Ohio. The lands to which Virginia purportedly surrendered title to the United States in 1784 encompassed both Ohio and Indiana.[4] Ohio could not reasonably have believed, after *Handly*, that its claim over the northern half of the Ohio River rested on a footing different from that of Indiana.

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[4] *See Indiana* v. *Kentucky*, 136 U. S. 479, 508 (1890). See also the deed of March 1, 1784, referred to in n. 2, *supra*, from Virginia to the United States. On August 7, 1789, Congress passed "An Act to provide for the Government of the Territory Northwest of the river Ohio." 1 Stat. 50. In 1800, this territory was divided into two separate governments. 2 Stat. 58. And on April 30, 1802, the enabling Act for the admission of Ohio was passed. 2 Stat. 173. The State was formed out of the eastern half of the theretofore divided territory and was "bounded . . . on the south by the Ohio river," *ibid.*; the land in the eastern division not included within the boundaries described for Ohio "is hereby attached to, and made a part of the Indiana territory." *Id.*, at 174.

of this Court are too close to support that claim. Ohio recognized this in its initial brief here.[9] Nor, in the light of the long-standing and unequivocal claims of Kentucky over the river, and Ohio's failure to oppose those claims, may Ohio credibly suggest that it has not acquiesced. "The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926). To like effect are *Vermont* v. *New Hampshire*, 289 U. S. 593, 613 (1933); *Maryland* v. *West Virginia*, 217 U. S. 1, 42–44 (1910); *Louisiana* v. *Mississippi*, 202 U. S. 1, 53–54 (1906); *Virginia* v. *Tennessee*, 148 U. S. 503, 523 (1893); *Indiana* v. *Kentucky*, 136 U. S., at 509–510, 518; *Rhode Island* v. *Massachusetts*, 4 How. 591, 639 (1840)."[10]

Here we have not only long acquiescence by Ohio in Kentucky's open claims over the river, but also lines of cases by this Court and the courts of both Ohio and Kentucky that, for more than 150 years, placed Ohio on consistent notice of the inadequacy of the claim it now asserts. We find ourselves in agreement with the Special Master that Ohio is foreclosed from claiming that its

[9] "Like Ohio, the State of Indiana was formed from the land ceded by Virginia; therefore, it has for its southern boundary the Ohio River. See 3 Stat. 289 (1816), and 3 Stat. 399 (1816). Thus, a determination of the boundary between the states of Indiana and Kentucky would control the determination of the boundary between the states of Ohio and Kentucky." Brief in support of motion for leave to file complaint 10.

[10] The situation, of course, is otherwise when the States' boundary dispute has been open, continuous and of long standing. See, for example, *New Jersey* v. *Delaware*, 291 U. S. 361, 376–377 (1934); *Oklahoma* v. *Texas*, 272 U. S. 21, 46–47 (1926); *Arkansas* v. *Tennessee*, 246 U. S. 158, 170 (1918).

pined by a demurrer. The majority's conclusion of indefiniteness is, therefore, not sustainable.

The Court's decision is a determination upon the merits of Ohio's pretrial allegations and should be made only after all the evidence is before it. The Master concludes, and the Court agrees, that Ohio has acquiesced to Kentucky's ownership of the northern half of the Ohio River as established by adjudications in this Court. Although I find such consideration of the merits to be premature, the Court's reasoning prompts me to review the case law upon which estoppel is urged.

The Ohio River serves as the boundary between the States of Kentucky and Indiana as well as the boundary between the parties to this suit, Kentucky and Ohio. During the 19th century, this Court dealt with the nature of the Kentucky-Indiana boundary in two cases. *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), and *Indiana* v. *Kentucky*, 136 U. S. 479 (1890). Later cases dealt with issues that turned upon the boundary de-

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events, including the reservation of the charter in 1624 when Virginia became a Crown colony, 1 J. Marshall, The Life of George Washington 90; 3 W. Hening's Stat. at Large 536–626; 1 Laws of the United States 465 (D. & D. ed. 1815) (hereinafter Laws), and the ceding by the French to the British of the Eastern Mississippi Valley north of the Ohio River under the Treaty of Paris in 1763, 1 Laws 441–442; A. Shortt & A. Doughty, Documents Relating to the Constitutional History of Canada, 1759–1791, pp. 113, 116, sharply curtailed Virginia's reach and that the middle of the river was intended as the boundary between old and new States by the United States following the Revolution. It seeks to substantiate this final point by reference to various laws that prescribe the boundaries of new States; 1 Laws 475, 480, provide for navigational rights, id., at 479–480, and speak in general terms of Virginia, Kentucky, and Tennessee as the lands south, or north and east, of the Ohio River, and of Ohio, Indiana, and Illinois as the lands to the north, or the north and west, 2 Laws 14, 104, 138, 179, 311, 421, 533; 3 Laws 367, 385, 396, 403, 412.

made clear by the language of these cases." The most recent of the three, indeed, states quite explicitly:

> "It does not become necessary, in this case, to determine whether the middle of the Ohio River . . . does or does not constitute the boundary line between the states of Virginia and Ohio. For all the purposes of this case, it may be assumed that Virginia was the original, undisputed owner of the territory on both sides of the river, and still retains all that she did not part with by her deed of cession in 1784." [*]

Ohio now wishes to question precisely that assumption. In prematurely judging the issues and preterminating briefing and argument of Ohio's attack on the validity of Virginia's title, the Court does disservice both to the adjudication of this dispute and to the procedural contours of original actions. I would allow Ohio to amend its complaint so that the merits might be reached in due course.

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[*] 2 Ohio, at 310 (discussing only ownership of the land above the water line but below the bank); 11 Ohio, at 139–140 ("The defendant's deed conveys the soil to the *top* of the river bank, and reserves the 'break and slope,' between that point and the river"); [*] 3 Ohio St., at 245–246 (noting that "In the case of *Handly's Lessee* v. *Anthony*, the supreme court of the United States, proceed[ed] on the assumption that Virginia was the original proprietor of both sides of the river . . ." (emphasis added)).